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UNITED STATES CIRCUIT COURTS OF APPEALS REPORTS

WITH KEY-NUMBER ANNOTATIONS

WITH TABLE OF CASES IN THE UNITED STATES CIRCUIT COURTS OF APPEALS WHICH HAVE BEEN PASSED UPON BY THE SUPREME COURT OF THE UNITED STATES

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[1] Appointed November 5, 1919.
[2] Died September 26, 1919.
[3] Died September 15, 1919.
[4] Appointed October 22, 1919.
[5] Died September 24, 1919.
[6] Appointed November 5, 1919, to succeed Hon. Howard C. Hollister.

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[7] Retired pursuant to the statute.
[8] Appointment confirmed October 13, 1919, vice Hon. David P. Dyer, retired.

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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS

(259 Fed. 1)

MUNRO, Trustee, v. SMITH et al.

(Circuit Court of Appeals, First Circuit. June 18, 1919.)

No. 1359.

1. APPEAL AND ERROR ⟹1008(3)—REVIEW—FINDINGS.

Where the case turned on admitted facts, the inferences therefrom, and on the interpretation of written evidence, the usual rule that appellate court will give great consideration to conclusion of trial judge does not apply.

2. TRUSTS ⟹110—CONSTRUCTIVE TRUSTS—EVIDENCE—SUFFICIENCY.

In a suit by the trustee of a bankrupt mining company against stockholders and officers of the company on the theory that directors and stockholders who had acquired title to mining claims which the company was developing under an option contract to purchase and who were working in connection with the manager of the company who expected to acquire its valuable personal property by enforcing his claim for salary, evidence *held* to establish a conspiracy to wreck the company and to furnish basis for the enforcement of a constructive trust; the parties to the conspiracy acting in violation of the relation of trust.

3. CORPORATIONS ⟹308(1)—MANAGER—RIGHT TO COMPENSATION—IMPROPER CONDUCT.

If a manager of a mining company, the scene of whose operations were in a state far distant from that in which the stockholders and directors resided, rendered no faithful service to the company and joined with stockholders and directors all of whom were maneuvering to get the property away from the company for their own benefit, there can be no recovery for services after the time the agent joined in the conspiracy.

4. CORPORATIONS ⟹183—STOCKHOLDERS—ACQUISITION OF PROPERTY—CONSTRUCTIVE TRUSTS.

Where stockholders of a mining company, which was in possession of a claim under an option contract of purchase allowing the company to abandon the purchase on forfeiture of payments made, secretly acquired the claim and concealed that fact from the company, accepted payments, and later declared a forfeiture for nonpayments, *held*, that the stockholders some of whom had been directors could not justify the secrecy on the theory that until they had been paid the full amount which they paid for the claim they were entitled to conceal the true situation, but such stockholders are immediately responsible for their fraud.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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Appeal from the District Court of the United States for the District of Rhode Island; Arthur L. Brown, Judge.

Bill by Arthur E. Munro, trustee, against Fred L. Smith and others. From a decree for defendants (243 Fed. 654), complainant appeals. Reversed and remanded, with directions.

Harry M. Holbrook, of Providence, R. I., for appellant.

Richard E. Lyman, of Providence, R. I. (Lyman & McDonnell and Thomas F. I. McDonnell, all of Providence, R. I., on the brief), for appellees.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

ANDERSON, Circuit Judge. This is an appeal from a decree of the District Court for the District of Rhode Island, dismissing with costs a bill brought by Arthur E. Munro, trustee in bankruptcy of the Big Chief Mining Company, adjudicated bankrupt August 24, 1915, in said District Court. The defendants are Fred L. Smith, formerly a director and now a stockholder and creditor; Charles J. Davol, also a stockholder and creditor—both citizens of Rhode Island. Mary H. Carroll, executrix under the will of Thomas A. Carroll, was originally named a defendant, but during the trial the bill was, by a consent decree, conditionally dismissed as to her.

Frederick E. Browne, a citizen of California and a mining engineer, where he was resident general manager of the bankrupt's mining property as well as statutory agent, was named as a defendant but was not served. He did, however, attend as a witness and testify.

The bill alleges fraud, collusion, and conspiracy on the part of Smith, Davol, Browne, and Carroll, deceased—in which fraud breach of fiduciary duty plays a large part—to obtain the bankrupt's property for themselves.

The trial in the District Court went upon the theory that the plaintiff's right of recovery should first be determined, leaving, if the bill should be sustained, the question of the amount of damages and the nature of the relief, for subsequent consideration. As that court found no liability the case was really only partially tried.

The pleadings are long, covering, with their annexes, 90 printed pages. Both the bill and the answers are argumentative. There is little dispute as to basic facts. The defendants' counsel admit performance by the defendants of practically all the substantive acts stated in the bill.

The evidence is also bulky, covering nearly 300 pages besides corporation records not printed. Most of this evidence, however, consists of correspondence between the parties during the period of the transactions in question. The parol evidence adduced before the District Court is of minor significance.

[1] The case must turn upon the admitted facts, the inferences therefrom, and upon the interpretation of written evidence, in considering which, of course, the District Court had no substantial ad-

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vantage over this court. The usual rule of giving great weight to the conclusions of the trial judge who observed the appearance and the manner of the witnesses is not, therefore, to any substantial degree, applicable in this case. As we are not able to adopt the views of the District Judge, it is necessary to deal in considerable detail with the evidence and necessary inferences therefrom.

The bankrupt is an Arizona corporation, a successor of the California Big Chief Mining Company, a California corporation. The earlier company on May 14, 1910, made a contract with W. Mack Foster and Lee W. Foster, owners of a two-thirds undivided interest in certain mining claims called the Jumbo claims, and with Pat and Lulu McCluskey, owners of the other one-third undivided interest, by which the corporation became entitled to purchase these claims located at Hart, Cal., for $50,000, paying therefor out of the net returns of mining in monthly installments arranged upon a sliding scale, but with a guarantee of certain minimum monthly payments which, from January, 1911, were required to be at least $450 a month. Nonpayment of the monthly installments after 30 days' notice grounded forfeiture of the company's rights under the contract.

The company did not agree to pay this full amount of $50,000, but had the right to abandon, and in case of abandonment, or forfeiture, was entitled to remove the mill, machinery and mining tools used by it on the property described. The bankrupt also owned, or had rights in, certain other claims called the Fairview group and the Oro Belle No. 2; but these claims do not seem to have been regarded as of great importance. The main reliance for financial success was upon the acquisition and development of the Jumbo claims.

In July, 1913, the bankrupt had some 300 stockholders, about 100 of whom are referred to as the chief stockholders. From most of these chief stockholders money had been borrowed on time notes referred to as debenture notes. Into this mining enterprise there appears to have gone about $140,000 in cash. This investment was represented in July, 1913, by outstanding stock of the par value of something over $1,600,000, and by debenture notes of $36,487.83 owing its chief stockholders. Debts to outsiders, not including Browne's salary claim of $886.09, amounted to only about $2,300. Its assets consisted of its mining claims, and a mill and other mining implements on the Jumbo group into which appears to have gone about $27,000. The value of the mining claims was, of course, problematical. They are referred to as a prospect and "not a poor man's prospect." The mill had, in 1913, been put in operation; but the results were disappointing; its operation did not produce sufficient profits to pay operating expenses and the accruing payments under the Foster-McCluskey contract. New capital was therefore needed to develop the claims.

The financial status thus outlined remained substantially the same up to the time of the bankruptcy in August, 1915, except that the debenture notes, including apparently some accruing interest, had increased on August 23, 1915, to $57,319.41. Browne's claim for salary was then about $4,000. But within this period of about two years

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18 additional payments of $450 each seem to have been made for the Jumbo claims under the Foster-McCluskey contract; so that, theoretically at least, the bankrupt's interest in its mining property had been increased. The company's debts except to its larger stockholders were, during the entire period, almost negligible. Most of the chief stockholders appear to have been resident in Rhode Island and in Massachusetts.

[2] We have, then, the common case of a mine in the West, mainly owned and financed by eastern investors, who were at the same time creditors and stockholders. The enterprise was embryonic; additional capital and successful development thereby was essential to save the investment already made.

The defendant Browne was a mining engineer, and was appointed resident manager in March, 1912. Whether he was the original promoter of these mining enterprises does not clearly appear. The directors of the corporation were all resident in Rhode Island or in Massachusetts. Browne was the only official on or near the company's property. Upon him as the resident manager the bankrupt and its board of directors 3,000 miles away relied and had a right to rely. In May, 1912, Browne was also appointed under a California statute disbursing agent and agent for the acceptance of service, and held these two positions until the adjudication in bankruptcy on August 24, 1915. The defendant Smith had been a director of the enterprise from February, 1910, and remained a director until May, 1914. His resignation was accepted on May 19, 1914, and on that date Carroll was elected, at Smith's request, as his successor. Carroll was a practicing attorney in Providence, and acted as counsel for the company. Counsel for the defendants deny that he was under any general retainer. He was one of two attorneys whose names appear on the letter head of the company, Exhibit 14. He appears to have been, during the period in question, the only counsel generally relied upon by the officers and directors of the company for advice and assistance in the East. It fairly appears that he expected the company to consult him on any questions which could be dealt with by eastern counsel. He was the company's attorney; whether its "general attorney" is immaterial. Charles J. Davol was a substantial business man in Providence and one of the chief stockholders and creditors of the company. Smith and Carroll were also substantial stockholders and creditors. John M. Welch was one of the directors referred to as "fiscal agent," and seems to have been the most active of the directors in raising money for the enterprise.

Smith, Carroll, Davol, and Browne were friends. In the late summer and early fall of 1913, Browne was in Providence and in conference with the officers and directors of the company, including Smith and Carroll, as to its condition and prospects. There is nothing in the record showing just what conversation took place between him and Smith at that time; but after his arrival in Hart, Cal., on October 23, 1913, he wrote Smith that the mill was still running but not on full time, and:

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"I will keep you fully advised as the development progresses, having in mind the deal we talked over with Mell Church. I see an opportunity to make a wonderful thing out of this mine: I feel so absolutely sure that we are going to develop a big property that I would be quite willing and anxious to invest my personal funds in it, provided they were of sufficient extent that I could see the proposition through. I can safely assure you that you will not take any chance in financing and buying out the McCluskey-Foster interests."

From this and from the admissions in the answers and from other correspondence and evidence, it clearly appears that Browne, the general manager of the company, while in Providence in 1913, told Smith, one of the directors, that the Foster-McCluskey interests could be bought in at much less than the contract price and discussed with him some "deal." Instead of disclosing this situation, as in duty bound, to the officers and directors of the company, he entered into private negotiations with Smith, one of the directors, to buy it in for themselves and their associates in the scheme. Smith in some form of words authorized him to enter into negotiations with Foster and McCluskey to buy in, at a greatly reduced price, their rights in the Jumbo claims.

The negotiations with the Fosters succeeded. If the company had continued its payments under the outstanding contract, the Fosters would have been entitled to receive $21,433.32. In January, 1914, as a result of the negotiations through Browne and certain intermediaries whom he employed, $5,500 was paid to the Fosters for their two-thirds undivided interest. Carroll, then attorney for the company and also attorney for Smith, furnished $1,500 of this total consideration of $5,500. Carroll also advised as to the negotiations and arranged that the Fosters' interest should be deeded to one Fay, a friend of his, to hold for the benefit of Smith, $^{40}/_{55}$, and of him, Carroll, $^{15}/_{55}$. The deed to Fay was executed on January 30, 1914.

Eleven $450 payments were thereafter made. Two-thirds of these were remitted, through the California Bank through which the payments were made, to Fay, and immediately turned over by Fay to Carroll, who divided it between himself and Smith in the proportion of 15 to 40.

Smith, Browne, and Carroll carefully concealed this purchase from the other officers and directors of the company. Smith also authorized negotiations for a purchase of the McCluskey interests at about the same proportionate rate. But the McCluskeys refused to sell. The correspondence between Smith in Providence and Browne in Hart, Cal., disclosed various schemes on their part to force the McCluskeys to sell out on their terms. Among other plans they discussed compelling the McCluskeys to furnish a bond guaranteeing their financial responsibility. They also discussed the position they could put McCluskey in if Fay, who was acting for them, should at their suggestion refuse to join with McCluskey in giving notice of forfeiture in case the company should default on its monthly installments. While nothing came of these tentative schemes for unfairly crowding the McCluskeys out of their rights, the evidence is indicative of the business methods and ethical standards of the parties to this unpleasant correspondence.

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That both Browne and Smith were fully conscious of their fiduciary obligation to give the corporation of which they were officers the benefit of the Foster purchase abundantly appears, inter alia, in a letter from Browne to Smith dated February 26, 1914. He says:

"In your letter of the 9th you suggest that if the interest were yours you would not be in a hurry to turn it over to the company. Candidly I have no such intention."

Their plan contemplated alternative future conditions:

First. If the company should continue making these monthly payments to the full amount of $50,000, they intended, through their ownership of the Foster interest, to make a large secret profit. As Smith and Carroll held debenture notes, as did the other larger stockholders, this secret profit would pay those notes and more besides. If, thereafter, the company should fail, they would, through this scheme, as creditors, get a preference over other creditors having like rights. This was one aspect, not remotely possible, of the scheme they devised. Cf. 10 Cyc. p. 803.

Second. If the company should fail to raise, either out of the proceeds of operation, by additional sales of stock or by flotation of notes among its stockholders, money sufficient to continue the payments under the Foster-McCluskey contract, then, through forfeiture of that contract, Smith and Carroll would become the owners of two-thirds of the Jumbo claims. But as under the contract the mill and other mining property might be removed, it was necessary for the complete success of their scheme to supplement the Foster purchase by some method of getting title to this mill. For this they thought they might use Browne's accruing claim for salary at the rate of $300 a month in cash (besides a certain additional amount payable in stock). As early as March 12, 1914, their plan to thus get title to all of the bankrupt's property was fully formulated. On that date, Browne, in California, wrote Smith in Providence at length, and, after discussing the prospect of buying in the McCluskey interest, said:

"My other account of $2,112.96 is the balance I have due me on account of my cash salary, that I have not drawn. In order to let this item reach the amount it has, I do not want you to think it is profit from my stay in Hart, on the other hand, I have had to draw upon other resources in order to pay my actual living expenses. If I did not have some money of my own before coming to Hart, I would have found myself in one hell of a boat, as it is has been impossible for me to draw anything without letting the men or bills go unpaid. You may also rest assured that I think the property is good for the amount or I would have folded my tent and left some time ago. Unless things take a change you may rest assured that I will be the owner of the mill and machinery and you will own the mine.

"This account is another reason why there should be a reorganization: If I turn my stock holdings into a new company and pay the assessment from what I have due me, it lessens my account just that much. It does not seem to dawn upon Mr. Allen and Mr. Welch that there is a certain fixed expense which continues all the time whether the mill is operating or idle."

This single sentence, "Unless things take a change you may rest assured that I will be the owner of the mill and machinery and you will own the mine," shows, particularly when buttressed as it is but-

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tressed by much other corroborative correspondence, a definite, fraudulent plan by this general manager and this director to use their fiduciary positions for the purpose of despoiling the company they were bound to protect and serve. Carroll was also a party and intended profit sharer in the scheme.

Meantime, in the spring and early summer of 1914, Browne submitted to the board of directors estimates of the amount of money necessary to put the mill in operation and provide working capital. Attempts were made by Welch and Allen, who was president of the company, to raise the $10,000 to $20,000 stated by Browne to be necessary for these purposes. While the evidence does not clearly warrant a finding of bad faith on Browne's part as to these recommendations, yet, when we consider that he was at this time really acting in conspiracy with Smith and Carroll for the purpose of acquiring the entire property for the benefit of themselves (and a little later for Davol), we should not be warranted in finding that this plan represented his real judgment as to the best method of financing and operating the mine for the benefit of its entire body of creditors and stockholders. He had embarked on an adverse enterprise. He was managing really for Smith, Carroll, and himself—not for the company whose nominal manager he was.

Plans for raising additional capital did not succeed. Just why they failed does not clearly appear. But it does clearly appear that one natural and inevitable result of Director Smith's secret plan to act against his company and not for it was his refusal to meet and confer with Director Welch, who was the most active in attempting to raise the supposedly needed additional capital. As early as February 4, 1914, Smith, in Providence, writes Browne, in Hart, that—

> "Mr. Carroll and I have talked over matters from time to time. * * * Have not seen Welch for three weeks and do not know how he is getting along. I have kept away from him as I have expected if I did see him he would ask me about our matter and I wanted to keep it quiet until it was all over. Can see no reason why he should suspect anybody unless it comes out through the Fosters or McCluskey."

The language "to keep it quiet until it was all over" obviously refers to the same plan referred to by Browne when he said, "Unless things take a change you may rest assured that I will be the owner of the mill and machinery and you will own the mine."

On May 21, 1914, Smith in Providence writes Browne at Hart that his resignation from the board of directors was accepted "and Mr. Carroll elected in my place." He states further that when he sent in his resignation to Mr. Allen, the president of the company, the president held it over "hoping he could get me to remain on the board and not have anything go any further, but I told him there was nothing doing as I wished Mr. Carroll to take my place, as it was not possible to increase the board to over seven and there was nobody else whom I wanted to resign outside of Shaw and Welch, and, of course, they did not want to do it so I thought the best way to do was for me to resign and have Carroll represent me."

This quotation and other language bearing the same implication shows that Smith was fomenting, or intended to foment, discord in

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the board of directors in order to conceal his real relation to the enterprise and his intended subsequent action as to assisting in raising additional funds needed to prevent forfeiture of the Jumbo claims and to provide working capital. Success in raising working capital could not fairly be expected under such circumstances.

Carroll took Smith's place on the board of directors, fully conversant with the situation. That he acted there for Smith, Browne, and himself (later for Davol also), and not for the corporation, is the inevitable inference.

That the money to try out the value of the company's contingent rights in these mining claims might have easily been raised, if Smith, Browne, and Carroll had acted in good faith, seems beyond question. The effect of the withdrawal of Smith's assistance because of his adverse interest is indicated, inter alia, by what he said in his letter of May 21, 1914, to Browne:

> "Stearns" (another director) "is very much interested and, in fact, he and I together raised in fifteen minutes $3,250 towards the $15,000.00 and if he and I put our shoulder to the wheel there is no chance but what we can raise the money, but we do not propose to raise it and carry everybody as it is not fair, so please try to be patient."

Lest this be misunderstood, we add that there is no indication that Stearns was in any way a party to the fraud or acting in other than entire good faith.

Whether Browne was also holding up operations at the mill as a part of the plan is not free from doubt. Even Smith, in a letter to Browne, said:

> "Of course I do not understand really why you could not start up and run out enough stuff to get your pay or to help raise the $15,000."

The truth probably is that Smith, Carroll, and Browne were at that time willing that the other creditors and stockholders should raise money enough to continue payments under the Foster-McCluskey contract; but they apparently preferred that the enterprise should not be a large and demonstrated success. The evidence as a whole forces to the conclusion that they thought their profits from their scheme would be larger if they got the entire property instead of realizing merely the profits accruing under the contract from the secret purchase of the Foster interest. Moreover, they probably all recognized that, if the enterprise succeeded, Smith's purchase would ultimately be disclosed and they held accountable for their secret and fraudulent profits; whereas, if a forfeiture was declared and Browne got title to the mill and other property on execution sale, the chances of any creditors or stockholders pursuing them would be comparatively slight.

In June, 1914, Browne came east to Providence. At about this time Smith loaned Browne money for his personal needs, taking his note therefor. This fact alone would not be of much significance. Considered in connection with other facts bearing upon the relations of the parties, it is not without weight. During the summer Browne was in communication with President Allen and the other directors of the company concerning the needs of the company and means of

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financing it. No disclosure was made of the purchase by Smith and Carroll of the Foster interest. Smith, Carroll, Browne, and Davol were in frequent conference. It was then arranged that Davol should buy out the McCluskey one-third undivided interest in the Jumbo claim. The purchase was completed on September 2, 1914. The negotiations for this purchase were conducted by Browne for Davol through an officer of the San Bernardino National Bank. It was understood by all four of the parties—Smith, Davol, Carroll, and Browne—that this purchase also should be kept secret from the directors and officers of the company. Davol paid for the McCluskey one-third interest $4,-700—a reduction of about $5,000 from the amount which would have accrued under the contract.

Davol at the time of his purchase knew that Smith had purchased the Foster interest through Browne.

If the defendants' counsel are correct in their claim that Davol did not at that time know of Carroll's interest in the Smith purchase, this ignorance is of no significance. Clearly, he knew of Carroll's interest shortly thereafter, and then, if not before, adopted and made his own all the acts and plans of Smith, Browne, and Carroll to get possession of the entire property of the bankrupt by fraudulent means.

Contemporaneously with this purchase by Davol of the McCluskey interest, strenuous attempts were made by Welch and other directors to raise money to pay the monthly installments, the balance of Browne's salary, for which he was pressing, and to start up the mill and otherwise develop the property of the company. A subscription paper dated September 14, 1914, was signed by most of the chief stockholders who were also holders of the debenture notes, agreeing within 30 days to pay in one cent per share on their holdings, and—what was of vital importance—that the debenture notes then outstanding in the hands of the subscribers should be extended for two years from September 15, 1914. Without such extension no plan of financing had the slightest prospect of success. Carroll was then on the board of directors acting really for Smith, Browne, Davol, and himself, and not for the corporation.

Pending the success of this enterprise for financing the company, on September 15, 1914, Smith, in Carroll's office, in behalf of himself and Davol, dictated to Carroll a letter for the purpose of having it read by Carroll at the meeting of the board of directors. In this letter Smith, for himself and Davol, offered to contribute to the new financing called for by the stockholders' committee his proportion of one cent per share on his present stockholdings, on conditions as follows:

"(1) That the whole of the money so raised shall be used for the payment only of bills now overdue at Hart, Cal., and the starting and operation of the property there. (2) That the full amount of $12,500 so raised be transmitted to F. E. Browne, at Hart, Cal., to be used for these purposes. (3) That the stock represented by the unpaid check of F. E. Shaw be transferred to the company. (4) That all the principal stockholders pay their contribution of one cent per share to this fund, regardless of whether more than $12,500 is raised or not."

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The obviously intended effect of this letter was to discourage other prospective subscribers to the fund; because, Smith and Davol refusing to extend their notes, other contributors to the fund were thereby warned that Smith and Davol might use their overdue notes as a means of forcing payment out of money contributed by their co-creditors. But this scheme was really worse than it then appeared to the other directors; for Smith's conditions, if accepted, would have put the entire fund into the hands of Browne, who would have used it, first, to pay the amount claimed to be due him and to the small creditors at Hart, Cal., and, second, to improve the property which subject to his contract was then owned, not by the Fosters and McCluskeys as the other directors supposed, but by Smith, Carroll, and Davol. As Smith and Davol required the entire fund to go into Browne's possession to be used only for the payment of overdue bills and for the starting and operation of the property, payments under the Foster-McCluskey contract would be defaulted, grounding a forfeiture on thirty days' notice.

Otherwise stated: If the other creditors and stockholders in this enterprise accepted the proposition of Smith and Davol, put up through director and attorney Carroll, of raising a substantial sum of money for further development of the enterprise, Smith, Davol, Browne, and Carroll were almost certain to get the entire benefit of it. If, irritated as they naturally would be by the refusal of Smith and Davol (there is some dispute as to what Carroll's apparent and disclosed attitude was), the other parties in interest refused to raise any additional money, then the situation was ripe for Smith, Carroll, Browne, and Davol to declare a forfeiture of the Foster-McCluskey contract and for Browne to bring suit on his claim for salary, buying up also, as he did with money furnished by Smith and Davol (one or both), other small claims amounting to about $1,000. Smith and Davol also agreed to furnish Browne money necessary for his litigation expenses.

In late September, 1914, Browne returned to Hart, Cal. The success or failure of the financing plan had not then been determined. On October 1st, Smith, in Providence, writes Browne in California, stating, among other things:

> "In conversation with Carroll yesterday he thought it was best for you not to put on the attachment until after we find out what they are going to do. Then there will be no fault found about the three of us, but I understood that you were to see Mr. Parsons and follow out his instructions. Of course, Carroll is not familiar with the California laws and, of course, Mr. Parsons is. Carroll is going to see Welch in regard to the payment which is in default and follow it up."

This, and much more bearing in the same direction, shows that before Browne left for California definite plans had been made to use Browne's claim, through attachment proceedings, to get early possession of the mill and other removable property, and contemporaneously declare a forfeiture of the Foster-McCluskey contract.

On October 15, 1914, Carroll writes Smith, then at Webster, Mass., a letter which we quote in full:

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"Providence, R. I., October 15, 1914.

"Mr. Fred L. Smith, Webster, Mass.—My dear Fred: I received a copy of the letter which was mailed to you from your office last evening, setting forth the condition of affairs at Hart, California. Just as I was about to write you concerning this letter Mr. Welch came in and informed me that payment of $450.00 on the contract had been sent to the bank some time ago, the date not given, and that either yesterday or to-day, he had sent the second payment, which would be due to-day, taking the full limit of thirty days for payment. This consequently heals any breach of the contract, even though notice had been given under the provisions of the contract. I asked him where he got the money or rather, if the money sent to make these installment payments was money which would later be deducted from the subscription $12,500, and he said some of it was. He said that subscriptions or agreements to subscribe had reached something like $13,000.00 although some of the subscribers were not in a position to pay it all in immediately, but could pay it in three installments, and that further than that some of the large stockholders were willing to make their subscription 1½ cents per share rather than 1 cent, as originally set forth in the subscription claim itself. I told him that the subscriptions which I knew anything about were conditioned on the whole of the sum being raised and that unless it was, he could not figure in your subscription or that of Charlie, except on the express terms of your letter which I had shown to the directors.

"He has some man in two [tow] whose name I think is Holbrook, who is working with him in the raising of $10,000.00 and, as usual, is optimistic about getting the money on the debenture note proposition. I asked him if he realized that the payment of the Jumbo contract installments did not get the company out of difficulty and if he had considered the probabilities of Mr. Browne taking any action, reminding him of Browne's statement to the directors the day before he left here. He seemed to talk as if that was not a pressing and immediate trouble, but I reminded him that Mr. Browne had stated he would consult Mr. Parsons, his attorney, on his way back and if he was advised to protect himself by suit, that he would do so. Welch said while he did not think Browne would do it, that if he did so he felt sure that enough money could be raised to pay Browne, the Searchlight Company and other bills so as to prevent loss of the property.

"The fact of the Jumbo contract payments being made leaves the situation depending entirely on Browne's attachment, and if his severance of his connection with the company has not already been made known here, or his papers filed, it might be important for him to change his plan, and in any event, if he does not know that the payments have been made, he certainly should know by wire immediately. It does not seem probable that under the laws of any state that he can (get) a judgment immediately and without notice to the defendant, and when the writ is served, if the company has a resident attorney for the acceptance of service, it is his duty to send a notice of that fact to the proper officers of the company and who would be obliged to engage counsel to appear for them in the ordinary travel of the case, and to conduct the trial, if there were any to be had.

"If, therefore, the matter comes up to the board, it will be necessary to select some attorney in that section, and should he be one selected by Welch, Everson or Shaw, complications might arise immediately that would delay getting possession by execution for quite a little while.

"Naturally, I presume that Senator Carr, being a stockholder and formerly transacting some business for the company will be retained and if he has been displaced by Judge Carpenter through Mr. Browne, of course his interest will be for the company and against Mr. Browne. The latter speaks of getting judgment and execution and then negotiating the same and that is something which I do not approve of.

"In the hands of some one else who might not be bound by any agreements verbal or otherwise, to which Mr. Browne is a party, their interest might be jeopardized and I would suggest therefore, that if this claim goes to judgment and there is to be any negotiation or transfer of the judgment that it be turned over to the interests here and not to some Western third party. I

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believe that Everson and others, if face to face with the payment of Browne's claim or lose their interest in the property would see that it was paid, taking notes and stock, of course, for their protection. Of course, every time they do this it increases their claim as a creditor against the company, and also increases their stockholdings which might in time give them absolute control at any stockholders' meeting to elect such a board as will do their bidding.

"I am still of the opinion that when Welch tries to gather in the subscriptions that he will fail to do so, as without the subscriptions that you control he will be unable to get the requisite amount. I went over the matter of the Davol transaction with him and he still insists that he stands by the letter sent to with reference to the delivery of this stock and that Davol's failure to notify him at the expiration of four months releases this stock from the escrow. I told him if he persisted in this course and antagonized Mr. Davol that if anything happened to his holdings, or to the stock in this company he could charge it to this attempt to grab stock which did not belong to him. Of course, he repudiates the grab part of it, claiming it belongs to him, but I thought it was best to let him know that if he had any run in with Mr. Davol later that he himself would be to blame for tumbling the house of cards upon himself.

"One thing is very certain and that is Browne's attachment if brought to the point of the directors engaging counsel, will probably disclose the fact of the transfer of the Foster interest, but inasmuch as you will probably be here before any writ can be sent from California here I can go over that phase of the matter with you more at length and in detail.

"This is all I have time to write you tonight concerning this matter.

"Yours truly, Thomas A. Carroll."

This letter, apart from the abundant other evidence, compels to the conclusion that Smith, Davol, Carroll, and Browne were then in concert planning to take from the creditors and stockholders of this company all its assets, by declaring a forfeiture under the Foster and McCluskey contract and through the use of Browne's attachment proceedings based upon his claim for salary and the assignment of the Searchlight Company claim for $665.05 and the Adams claim for $290.50. Carroll, then attorney and director of the company, was also secretly advising the other conspirators as to how a speedy judgment and execution could be obtained in order to get without delay and effectually full title to all the assets of the bankrupt.

To their surprise and disappointment, the directors succeeded in raising money enough to make payments under the contract.

On October 20th, Smith telegraphed Browne that payments on the contract had been made, and that the directors were not aware of Browne's resignation or of any contemplated suit against the company. Meantime, Browne, in California, had arranged with the sheriff to attach the mill and other attachable property. Having completed his attachment, on October 21, 1914, he telegraphed President Allen that he had "terminated his services with the company on October 1st," that the Searchlight Company and the Allen Company had assigned their claims to him, and that he had attached all the personal property for $5,006. "Sheriff took possession to-day. You had better have Attorney Carr enter appearance in your behalf and save expense to company."

Browne testified that he sent this telegram on October 21st, saying that he had withdrawn as manager on October 1st, and:

"I didn't care about advising them of my plans, but I engaged the sheriff up there to attach the property. The day he arrived there I told them."

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In order to keep up the pretense of being a bona fide creditor enforcing long-postponed rights, on November 2, 1914, Browne sent the directors of the company a circular letter stating that he had terminated his services on October 1st and been forced to institute an attachment in order to secure the unpaid account of the Searchlight Company, George Adams, and himself.

Further light is thrown upon the relations of the parties to each other and to the corporation of which they were all creditors and of which Carroll was director and attorney and Browne general manager, by the admitted fact that about the middle of September, 1914, while Browne was in Providence, an agreement was made that Smith and Davol should pay Browne approximately ten per cent. of the profits they should make out of the Foster-McCluskey purchase after getting back the sums paid the Fosters and McCluskeys for those interests. Probably the actual agreement was made long before. But the date is immaterial; for counsel admits the agreement to have been made for dividing up the bankrupt's property while Browne was still manager and Carroll director and attorney. It thus related back to the beginning of the scheme. This arrangement was put in definite, written form in the spring or summer of 1915, after Carroll's death.

After Browne's attachment there was much urgency on his part for judgment by default so that he could get immediate possession of the property. On November 19, 1914, he urged upon President Allen the uselessness of an inventory by the sheriff, "for," as he says, "unless the Big Chief Company settles my attachment suit the property will all be mine and, speaking for myself, it will be unnecessary for me to have the inventory."

Meantime, on October 26th, at a meeting of the board of directors, Carroll, who was secretly advising Browne as to his attachment was, as attorney of the company, "instructed to communicate with Carr (the California attorney) so that the interests of the company should be protected in any proceedings instituted by Browne."

On November 24, 1914, Smith, in Providence, writes Browne, in California, saying, inter alia:

> "I saw Charley (Davol) yesterday at luncheon and he wanted to know about the payments. He, of course, is anxious to have something doing, and, of course, understands as long as the payments are met we cannot do anything as far as he and I are concerned. At the same time, I want to see Tom (Carroll) in regard to having Hooker send a telegram to the company giving them the thirty days notice and I can see no reason why these matters should be delayed. As soon as I see him I will write you in regard to what he has to say in reference to your matters."

On November 15, 1914, Browne, at Hart, writes Smith, at Providence, of the difficulties he is having in getting immediate judgment because of the fact that he (Browne) is statutory agent and cannot acknowledge service when he is party plaintiff. That he "did not think that Mr. Carroll would adopt the stalling tactics now being pursued by Attorney Carr of Los Angeles. * * * I am curious to know if Welch and Allen know that Charlie and you own the Jumbo group. If they do know it and do not approach Charlie and you and tell you that they are favorable to a reorganization, with an assess-

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ment on the stock, I will be forced to conclude that they are not in their right minds."

On December 7, 1914, Smith, in Providence, acknowledges this letter. He refers to his intention to get a conveyance from Fay of the Foster interest, which Fay was still holding; that he has just come from Carroll's office and showed him (Carroll) Browne's letter of the 15th; that Carroll stated that, when the Browne matter was brought to the attention of the board of directors, he was instructed to communicate with Carr, an attorney in Los Angeles, and that he stated to Carr that "your claim was entirely just and should be paid. * * * You will see, therefore, that there is no stalling tactics being pursued so far as Mr. Carroll is concerned in this case, and, as he says, he did not select Carr as the attorney for the company nor has he advised him what procedure to adopt at that end. He further stated that if it was his case he would go ahead and get service, if not through the appearance of the local counsel, in whatever other method is prescribed by law in that State, and that is my advice to you." After further discussion as to the best method of getting immediate judgment on Browne's claim, Smith adds:

"I am asking Carroll to resign from the board of directors at the next meeting and, of course, after he has resigned, he then will be able to take up outside affairs, such as mine and others as individuals, but you must appreciate the position he has held as a director and also attorney for the company.

"I hope that you will soon be settled in Los Angeles and that things again will be going along nicely with you, but Charlie and I will have to wait until things come to a head whereby we can get possession, that is, if the payments are not made as, of course, if the payments are made we do not expect anything to happen."

There is much more in the voluminous correspondence which passed between the parties during the winter of 1914 and 1915, showing that the four were acting in constant concert in their plans to get title to the mining property and the mill thereon, using Browne's claim for salary and Carroll's influence as attorney and director as part of the means relied upon.

On January 12, 1915, Smith in Providence writes Browne in Los Angeles, saying, inter alia:

"Do not think that Davol's and my transactions have come before the bunch here as Everson was in to see Tom (Carroll) a few days ago and he is thoroughly disgusted and discouraged with the management that has been in existence for the last six months and wants to withdraw and organize a new company. I thought best to wait until after the payments were made and let the thing take its natural course. If they are default (sic) in paying, then we get possession. At the same time, of course, your hold on the property fixes you. Thought possibly that might be a good way to get a bad matter straightened out by co-operation.

"Saw Charley (Davol) last night and he always asks if I have heard anything from you. He is anxious to do something as soon as we are in power to do it. Do not get discouraged because we are not as, of course, we have to let things take their course. You will certainly hear from me just as soon as there is anything doing."

On January 18, 1915, Browne, in Los Angeles, writes Smith a long letter, in which he states that he has confidence in the property and "know we will all profit by the enterprise." He also states:

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"In connection with the Big Chief Co.'s affairs, I am keeping a few cards up my sleeve that I have not played yet. Until I know exactly how my account is going to be treated, I am going to keep enough power in my hands to ruin them in case they try any funny business. Among other things, I have the water situation in the palm of my hand, and you may rest assured I am going to keep it there. I feel that I have enough unsettled business in my hands to cause the company more expense than twice the amount of the attachment."

There is other discussion in the correspondence relative to using the water situation for the purpose of destroying the company's property interests.

In February, 1915, Holbrook, present counsel for the company, was employed by some of the directors and stockholders to visit Hart and report upon the property. Under date of February 20, 1915, Browne writes Carroll a long letter, saying inter alia:

"The afternoon of the 4th inst. I told Mr. Holbrook that Smith and Davol were the owners of the Jumbo group. As an investigator, he did not ascertain this fact, as I volunteered this information. I knew, however, that it was only a matter of a short time until his attention would be called to it through the attachment notice on the mill. * * *

"He is highly indignant at the Smith deal, and stated to me that he was going to force you to resign from the board of directors, and expose you in such a way that you would be eliminated in future matters pertaining to the Big Chief. I stated that as far as I knew, you were ignorant of the Smith deal, as Judge Carpenter drew all the papers. Holbrook immediately connected Fay with Smith, and says he will institute a suit immediately compelling Smith to sell to the company his interest in the option for the consideration he paid. * * *

"It is not necessary for a man of my limited knowledge to give you advice in legal matters, but it impresses me that if Holbrook intends to take an antagonistic stand, against Mr. Smith and Mr. Davol, that it would be highly advisable for those men and yourself to delay any legal action until the notes held by the above parties fall due, assign them to me with instructions to place another attachment upon all of the property. I informed Mr. Holbrook that it would not be advisable to take an antagonistic stand against the above men, as they were keen smart business men, with the best legal advice, and with sufficient resources to fight any case that Holbrook cared to institute."

Browne's statement to Holbrook that Carroll was ignorant of the Smith deal was, of course, entirely false, for the arrangement with Smith for the purchase of the Foster interest was advised by Carroll.

Browne adds a postscript as follows:

"I neglected to say in my letter that Mr. Holbrook endeavored in every way possible to ascertain the amount paid by Fred Smith for the Foster interest, and Charles Davol for the McCluskey interest. I carefully guarded this piece of information and he therefore returns east with no knowledge of it.

"It is possible they could get this information from Geo. Foster, and if you think it advisable, I will write and ask him to consider the transaction absolutely confidential and to divulge no information. Naturally, Col. Goff will be the man who will get the information for Shaw & Everson."

This letter, it should be borne in mind, was written by the man who had been the chief reliance of the creditors and stockholders in this mining enterprise, to another man who was at that time a director and attorney of the company they were both seeking to ruin.

On the same date Browne writes to Smith in Providence:

"My dear Fred: Your letter of the 13th inst. came to hand yesterday; I could not reply immediately, as I was busy with Mr. Holbrook and getting some advance knowledge to Mr. Carroll.

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"Mr. Holbrook has expressed himself very forcibly regarding Mr. Carroll, Mr. Davol and yourself. Just before he took the train, he said to me: 'I will read Tom Carroll out of that Board of Directors, and make him ashamed to show his face. I will make Fred Smith turn the ⅔ interest over to the company for just what he paid.' Unfortunately, he does not know what you paid. That is where his case is weak. He undoubtedly could ascertain by getting into communication with Geo. Foster. but I am absolutely sure there is no man who will get that information out of Mack Foster or Lee Foster if I ask them to keep it confidential. I treated Mack and Lee Foster the way men of that type like to be treated, and I know they will stand by me through thick and thin. * * *

"I note what you say about Charlie wanting to start something, and from all appearances it will be started within a short time, when Holbrook starts to get your ⅔ interest at a bargain. I am sending Tom Carroll a telegram as per inclosed copy, in order that nothing will come as a surprise. * * *

"There is absolutely no question about the attachment being good, and there is only one way the Big Chief Co. can save themselves from losing the property, and that is by paying up. It was a terrible shock to Holbrook to learn that you and Charlie held the property and that I was about to take the improvements. Naturally, he was mad and chagrined and for that reason, I expect he will send some very unfavorable reports abroad broadcast about yours truly. I told him plainly that if he did not think the property was sufficiently good to continue the payments under the option, he should advise his clients to quit paying, and that it would be all right if he advised them to continue paying. In other words, I have the improvements corralled and whichever way he reports, it cannot hurt me, and in not hurting me, it will not hurt you or Charlie, as if we get possession of the property, we will certainly make some money.

"Since starting my suit, I have never written a word about a settlement, and it was this silence that made them send Holbrook, he of course assumes that you and Charlie were back of me. I told him I had plenty of money to fight to the last trench, but, I did not tell him from what source I would get the assistance."

On March 1st Browne in Los Angeles writes Smith in Providence, inter alia:

"You have always told me that it was due to my personality and representations that you invested in the Big Chief property: I can plainly see that Holbrook is going to return to Providence and place me in a bad light, owing to my not having told the company about the Fay-Davol deal: I think I can truthfully say that in his investigation this is the only thing he might in any way construe as being irregular: after hearing a clear statement of facts, Heney & Carr, the attorneys for the Big Chief here, stated in the presence of Mr. Holbrook and myself, that I was fully justified in making the deal for you and Charlie.

"This piece of information was most humiliating to Mr. Holbrook, and it naturally aroused an antagonistic feeling toward me: He is undoubtedly going to try to have me ousted from the position of manager: I do not care to be relieved of the position in that way, as the proposition is now standing upon the threshold of success, and if it should fall to the lot of another man to bring it to a successful issue, he will receive the credit therefor, and the failure will be charged to me. Therefore, before you agree to renew any notes, or to take any stand whatsoever in the affairs of the company, I wish that you and Charlie, Mr. Carroll and the Sternes brothers would insist that there be no change and that I be permitted to carry out the plans I have formulated. In case you find that Everson, Shaw, Welch and Allen have too much power against you, then I wish you would wait until your notes fall due, assign them to me and place another attachment upon the property. * * *

"I am counting on you and Tom Carroll to see that justice is extended, as I would not like to be robbed of the credit of making a producing mine out of the Big Chief.

"I am sending Mr. Carroll a copy of this letter in this mail."

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Browne's statement of his unwillingness to be "ousted from the position of general manager" is a curious and unconscious demonstration that he regarded his resignation of that position in the previous October as nothing but an empty form, a movement in the game that he and the other conspirators were playing in order to get for themselves the property of the company.

On March 23, 1915, Smith in Providence writes Browne in Los Angeles, stating that he has received his letters and would have called on Carroll and read them to him except for Carroll's court appointments. "He and I had a heart to heart talk last Friday morning." That Carroll was going to resign from the board of directors. After referring to various plans made to raise money to save the property by other directors, Smith says:

"I imagine that they will try every hook and turn to get the better of Charlie and I if they get half a chance and I do not think that it is Tom's intention that they will get a chance and the matter will be taken up as soon as he gets over his rush. Up to the present time they owe us three payments."

Although Holbrook, in his investigation, discovered that Smith and Davol had purchased the Foster-McCluskey interests, he did not succeed in finding out the amount paid, nor was this disclosed until the examination in bankruptcy.

After some further delay, judgment was finally entered on Browne's attachment suit on April 15, 1915, for $5,407.75. But, after the adjudication in bankruptcy this judgment was, on November 4, 1915, vacated in order to permit the bankrupt to set up in defense substantially the claims of bad faith and fraud on Browne's part referred to in this suit.

After Browne got his judgment and execution and was prepared to sell the mill and other removable property, he and his coconspirators became fearful that the Belmont, another mining company in the neighborhood, would bid above the amount of his execution and thus thwart the scheme to get title to the property, which of course they preferred rather than payment of the alleged debt upon which his execution was based. Consequently, a plan was devised for Smith and Davol to make an additional attachment of the mill as well as of the other mining claims not covered by the Foster-McCluskey contract, in order to get title to all the bankrupt's property for the prospective reorganization. Browne writes Smith on April 29, 1915, that if this Belmont Company should outbid him "the personal property would be all lost to the Big Chief, and it would upset our plans regarding a reorganization as the improvements would be gone."

"Do not lose any time in getting the notice in the hands of the Big Chief as the Belmont will buy some of the property north of the Oro Belle group and if the company again get in funds, you will have the same old crowd in control, that is Welch, Allen, Shaw, etc., and in the course of a few months everything will be back in the same condition as at present."

Steps were accordingly taken in behalf of Smith and Davol to attach and get a preference over other creditors. Smith writes Browne on May 8, 1915, inter alia:

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"Of course, you know all the note holders except Davol and myself gave another year or two extension, so all the notes that will come due for the next year or so are Charlie's and mine, so Mr. Lyman in his letter to you suggested that you talk over with Judge Carpenter and see what his idea was in regard to putting them on top of your attachment. Also Seusmann, Tom Carroll's assistant, was talking of putting in a bill for Tom's services on top of our notes."

A little later Browne wrote that—

The property he had under attachment was "worth about $25,000, and in case it should be sold it would be a great loss to the parties who might eventually come in possession of the claims mentioned in the contract of May, 1910. The Tonopah-Belmont, one of the largest and most influential mining companies in the United States, have taken an option on the property to the north of the group mentioned in the contract and in case all this property is offered for sale for about $5,500 they will undoubtedly outbid me at the forced sale. This would be disastrous to the interests of Smith and Davol and for that reason I am withholding action."

Smith, Browne, and Davol continued to keep secret the amount that had been paid for Foster-McCluskey interests, indicating their belief that the other creditors and stockholders would not go to the extent of a law-suit, putting them on the stand in order to obtain disclosure of this fact.

Payments under the Foster-McCluskey contract ceased as of January, 1915. After Welch and the other directors who had been active in attempting to finance the company ascertained that Smith and Davol owned the Foster-McCluskey interests, no further payments were made. Smith and Davol thereupon, upon April 28, 1915, and again on May 19th, gave notice, claiming forfeiture under the contract. An arrangement was also made between Smith, Davol, and Browne by which Smith and Davol should pay Browne in installments the amount of his judgment for $5,407.75 against the company in the proportion of two for Smith to one for Davol. The full amount has been paid, so that Smith and Davol own the Browne claim and all rights, if any, accruing under the attachment which was much more than four months old at the time of the bankruptcy adjudication.

In June, 1915, definite written agreements were made by Browne with Smith and Davol for Browne's services in helping Smith and Davol to buy in the Foster-McCluskey interests and in getting what the parties supposed was a title to the balance of the bankrupt's property. For these services Smith agreed to hold for Browne 8.79 per cent. of his two-thirds interest in the Jumbo claims and property, and Davol agreed to hold 6.03 per cent. of his interest in the property. Otherwise stated, Smith and Davol agreed to pay Browne the full amount of his claim for salary, including the amount that had been paid for the Searchlight and Adams claims, and to hold for his benefit about 8 per cent. of the property which they proposed to reorganize and operate. The fair inference also is that Browne expected to be salaried manager for the contemplated reorganized company.

The bankruptcy of the defendant and this suit have so far prevented the fruition of this plan of getting possession of the entire assets of this mining company. As already indicated, it was not until examination in bankruptcy that many of the facts above stated became

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known to the parties in interest. This suit was seasonably brought on May 15, 1916.

Carroll's executrix was made a party defendant, but, as the claim against her testator was not filed in the probate court within the time prescribed by the statutes for filing claims against the estates of deceased persons, counsel agreed upon a decree dismissing the bill as against the executrix, subject to the conditions that if a decree should be made as against Smith for a transfer of the Foster interests, the executrix should join with Smith in such conveyance and transfer on the same terms and conditions (except as to damages) as the said Smith might be required to make in such transfer; and also that the executrix should be enjoined from asserting against Smith a right to conveyance or transfer of any portion of the Foster interests. It was further provided that, if money or assets shall be paid to Smith as a condition of making such conveyance, the executrix should be entitled to an accounting from Smith for $^{15}/_{55}$ of such money or assets.

As Browne was not served, obviously no relief can be decreed against him in this suit. But the action sounds in tort; nonjoinder is of no avail to Smith and Davol. They are jointly and severally liable for damages and they hold the title to the Jumbo claims.

The gist of this case is that these four men fraudulently conspired to get title to a mining property which, whatever its real and ultimate value, must, for present purposes, be considered a valuable property. However risky the enterprise, it was one into which the stockholders and creditors had put about $140,000; it was by the defendants considered sufficiently valuable so that they were ready to risk substantial additional money and to resort to most extraordinary tactics in order to get title thereto. Even as late as September 3, 1915, after the adjudication in bankruptcy, Browne writes his own counsel as follows:

"You will undoubtedly recall that my reason for attaching the Fairview group and Oro Belle No. 2 was for the purpose of making a sale of the former property to the Tonopah Belmont, who were then operating the Oro Belle mine.

"The manager of the Tonopah Belmont approached me about a sale of the Fairview group, and if my plans had been perfected, we would have sold this property to the Belmont and Smith & Davol would have been reimbursed for the amount of the Big Chief notes. My plans were frustrated by the Tonopah Belmont surrendering their option on the Oro Belle, and by the Big Chief taking advantage of the bankruptcy act.

"While I consider the value of the Fairview group as entirely speculative, I did not intend to enter into negotiations with the Belmont Company for a consideration less than $15,000. We must rely, however, upon making a sale of this ground to the parties who will eventually control the Oro Belle property.

"The Oro Belle No. 2 claim, the other property owned by the Big Chief, has the southerly extension of the Oro Belle vein, and the northerly extension of the Jumbo. While the surface indications of this claim are not very extensive, the underground workings of both the Oro Belle and the Jumbo indicate the vein to pass through the entire length of the Oro Belle No. 2 claim, or 1,500 feet. I would consider this claim worth $10,000 to either the Oro Belle Co. or the Jumbo, but for a private individual to purchase the claim, its value would be problematical, as it would require extensive work to demonstrate its true worth.

"In my lettergram, I placed the value of the buildings, mine machinery and accessories, including mill, at about $22,000: I truthfully think they are

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worth nearer $25,000. These improvements are worth this sum to the parties who own the Jumbo group, as it will cost that sum to duplicate them."

The defendants certainly are in no position to contend that these properties would not have been of great value to the creditors and stockholders of the corporation now bankrupt. Whether, if the fraud had succeeded, the defendants would have profited or lost thereby, is immaterial. We cannot know that if the defendants had not been guilty of this fraud, this mining enterprise would not, before this, have been of great value, showing large profits to all of its stockholders.

It is too plain for argument that if Browne had disclosed to the directors of his corporation that the Foster-McCluskey interests were for sale at a large discount from the amount accruing under the outstanding contracts, so that the company could, instead of proceeding on a mere contingency, for a comparatively small sum have had a legal title to these mining claims, the whole problem of financing the enterprise, either to success or failure, would have been radically changed. For $10,200 instead of $32,000, this underlying title was actually secured by Smith, Carroll, and Davol. On the property there was then a mill. Apparently nothing then remained to be done to test the actual value of the mine except to furnish a reasonable amount of working capital to operate the mill. Possibly some additional expenditure, not large, was necessary for a water supply.

The evidence plainly warrants the finding that in the summer or early fall of 1914 the other parties in interest were ready to do their part in raising the full amount of money stated by Browne as necessary to put the property upon a paying basis.

In July, 1914, Browne wrote President Allen, stating, inter alia:

"I estimate that it will require about $15,000 to place the property upon a proper basis and in such condition that large profits can be secured."

This estimate of $15,000 covers continuing monthly payments of $450 each, under the Foster-McCluskey contract. It went upon the assumption that the corporation was entitled to no advantage by reason of the secret purchase of the Foster two-thirds interest by Smith and Carroll and the contemplated purchase of the McCluskey interest for which Browne was then secretly negotiating and which was conveyed to Davol on September 2, 1914. Certainly the defendants, whose agent and coadjutor Browne really was, cannot now be heard to say that, except for their fraud, the other parties in interest would not have raised the full amount stated by Browne as necessary for the success of the enterprise, or that if the money had been raised such success would not have been obtained. It would be monstrous to permit them to plead their own fraud, which brought the corporation to bankruptcy, as an excuse for the company's failure to make payments to them under the Foster-McCluskey contract.

The facts are, as already sufficiently indicated, that from at least as early as September or October, 1913, when Browne, the general manager of the company, entered into secret dealings with Smith and Carroll for the purpose of getting for the three title to the property of

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the corporation of which they were the fiduciaries, that no one of the three ever acted in good faith towards the corporation; that when, in 1914, Davol joined the schemers, he became privy to the entire plan including what had gone before; that the four were then definitely and persistently planning to prevent the raising of the requisite new capital, in order to ground a forfeiture and to get for themselves the property of the crippled enterprise; that in this scheme they used wrongfully his (Browne's) position as general manager, Smith's position as director, Carroll's position as attorney, and, later, Carroll's position both as director and attorney; that Browne's groundless claim for salary, forfeited when he broke his contract for faithful services to his corporation, was used by all four conspirators as an intended means of getting title to the mill and other removable property.

[3] We cannot accept the view of the District Court that Browne's salary claim was a "just debt long overdue" against which "no grounds of defense are alleged or proved," and "there is no doubt that the defendant Browne was fully justified in bringing suit against the company and attaching its personal property, and that this was entirely consistent with good faith."

Browne's action to recover as agent and general manager for services rendered is subject to the elementary rule that he must have exercised the utmost good faith in his dealings with his principal.

Compare Little v. Phipps, 208 Mass. 331, 333, 94 N. E. 260, 34 L. R. A. (N. S.) 1046; Quinn v. Burton, 195 Mass. 277, 81 N. E. 257; Parker v. McKenna, L. R. 10 Ch. 96, 118; Wadsworth v. Adams, 138 U. S. 380, 11 Sup. Ct. 303, 34 L. Ed. 984; Murray v. Beard, 102 N. Y. 505, 7 N. E. 553.

As stated by the Massachusetts court in 208 Mass. 333, 94 N. E. 261 (34 L. R. A. [N. S.] 1046):

"If the agent does not conduct himself with entire fidelity towards his principal, but is guilty of taking a secret profit or commission in regard to the matter in which he is employed, he loses his right to compensation on the ground that he has taken a position wholly inconsistent with that of agent for his employer, and which gives his employer, upon discovering it, the right to treat him so far as compensation, at least, is concerned, as if no agency had existed. This may operate to give to the principal the benefit of valuable services rendered by the agent, but the agent has only himself to blame for that result."

The same doctrine is stated in Quinn v. Burton, 195 Mass. 277, 279, 81 N. E. 257, as follows:

"It is a principle universally recognized, as founded not only on common business morality but on a sound public policy, that persons who act in a representative capacity, whether styled executors, administrators, trustees, or agents, are not permitted in the performance of their duties to put themselves in a position antagonistic to the interests of those whom they represent. Oberlin College v. Fowler, 10 Allen [Mass.] 545; Hayes v. Hall, 188 Mass. 510, 511 [74 N. E. 935], and cases cited; Staats v. Bergen, 2 C. E. Green [17 N. J. Eq.] 554, 558; Union Stock Yards Bank v. Gillespie, 137 U. S. 411, 423 [11 Sup. Ct. 118, 34 L. Ed. 724]; Ex parte Lacy, 6 Ves. 625. If, in fact, their principal suffers no harm, or may have been benefited, this inquiry is unimportant, as the object of the law is to secure fidelity in the discharge of fiduciary duties, uninfluenced by considerations which necessarily are corrupt in their tenden-

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cies. Harrington v. Victoria Graving Dock Co., 3 Q. B. D. 549. An agent who places himself in this situation creates the opportunity, and is exposed to the temptation, of taking advantage of his principal. In attempting to serve two masters, the presumption is that he will act for his own mercenary interests, and by assuming a double relation, he becomes disqualified to perform faithfully the services for which he was originally employed, and his conduct is fraudulent. New York, Central Ins. Co. v. National Protection Ins. Co., 14 N. Y. 80, 91; Reed v. Norris, 2 Myl. & C. 361."

Browne rendered no faithful services to his employer from the time when, in 1913, he ceased to manage for the corporation and began maneuvering to get the property away from his employer for the benefit of himself and his coconspirators. Not only could he maintain no action for services rendered as manager during that period, but the corporation had a plain right of action against him for breach of contract. He not only abandoned the service of the corporation, but he left the corporation in ignorance of that abandonment. What damages, if any, the company may be able to show as a result of that breach of contract, it is not for us now on this record to consider. But we hold that no part of Browne's claim for salary accruing atter the date of the beginning of his wrongdoing was, either in his hands or in the hands of Smith and Davol as assignees thereof, valid and enforceable for any purpose whatsoever. Of course any damage suffered by the use of this groundless claim in the attachment proceedings is a proper subject of evidence and assessment.

[4] While what has been said may cover the point, it is well to make it clear that we cannot assent to the doctrine of the District Court that—

"Until Smith and Davol got their money back they were entitled to protect themselves by secrecy, and permit payments to be made in regular course to the bank which held the deeds in escrow. Until this time there could arise no equity in the company to have the benefit of any contract which Smith and Davol had made, assuming that their contract was better than that originally made by the company, and assuming also that it was inequitable for them to buy on better terms than the company had assented to."

We think this was error. Liability for fraud by a fiduciary does not turn upon the question as whether the recreant fiduciary has or has not at the moment derived a profit from his fraud. No corporation can be safe if its directors and other fiduciaries are to be held guilty of no breach of trust unless and until the wrongdoing produces profits to the wrongdoers.

The result is that the decree below must be reversed, and, in accordance with the understanding on which the trial proceeded in the District Court, the case is to stand for further hearing upon the damages suffered by the bankrupt corporation from the defendants' wrongdoing, and upon the terms and conditions upon which conveyance should be ordered of the properties covered by the Foster and McCluskey contract. The case is not now ripe for this court to lay down in detail rules as to damages. We do, however, make it clear that we hold broadly that the plaintiffs' charge that the defendants entered into a fraudulent conspiracy to wreck this corporation, in

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order that the four wrongdoers might acquire for themselves all the assets thereof, has been sustained.

The decree of the District Court is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion, and the appellant recovers his costs of appeal.

(259 Fed. 23)

ATLANTIC TRANSPORT CO. v. STATE OF MARYLAND, to Use of JAKUBCZAK et al.

(Circuit Court of Appeals, Fourth Circuit. April 23, 1919.)

No. 1703.

1. MASTER AND SERVANT ⚷128—LIABILITY FOR DEATH OF SERVANT—NEGLIGENCE.

A stevedoring company, employed to load a ship which had the choice of using a steam winch or a spool, both furnished by the ship for lowering cargo into the holds, used the spool, which was not intended for such heavy weights, *held* liable for the death of an employé killed by the falling of a slingload, owing either to the inability of the man at the ship end of the rope to hold it or to some defect of the spool head, which, if it existed, was obvious.

2. SHIPPING ⚷84(3)—LIABILITY OF VESSEL—INJURIES TO STEVEDORES—APPLIANCES FOR LOADING.

A ship, under duty to furnish proper appliances for loading by a stevedore, who did so by furnishing a steam winch and spools, *held* not chargeable with negligence because it did not give instructions which to use in a particular case, but left the choice to the stevedore, which employed experienced men, and which by making an improper choice caused the death of an employé.

Appeal from the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge.

Suit in admiralty by the State of Maryland, to the use of Franciszka Jakubczak and others, against the Atlantic Transport Company, the steamship Monviso, and others. From the decree, the Atlantic Transport Company appeals. Affirmed.

Guion Miller, of Baltimore, Md. (J. Kemp Bartlett, of Baltimore, Md., on the brief), for appellant.

Charles T. Cowenhoven, Jr., of New York City (Kirlin, Woolsey & Hickox, of New York City, Ritchie, Janney & Stuart, of Baltimore, Md., Robert W. Williams, of Washington, D. C., and Peyton Randolph Harris, of New York City, on the brief), for appellees.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. This is an appeal by the Atlantic Transport Company from a decree in admiralty of the District Court of the United States for the District of Maryland, in favor of the libelants, who sued under the death statute of the state of Maryland (Code Pub. Civ. Laws, art. 67).

The suit was brought by Franciszka Jakubczak, the widow of Stanislaw Jakubczak, deceased, on behalf of herself and her children,

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⚷For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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to recover for the damage alleged to have been sustained by reason of the death of her husband, resulting from injuries received by him while engaged under the direction of his employer, the Atlantic Transport Company, in loading the steamship Monviso, owned by the respondent Navigazione Alta Italia, of Turin, Italy. The libel alleges that the respondents Italian State Railways and Navigazione Alta Italia are the owners of the steamship. The Italian State Railways was in fact the time charterer of the steamship Monviso, which was loading a cargo for the account of the Italian government. The respondent the Navigazione Alta Italia, owner of the steamship Monviso, appeared by its proctors.

At the trial of the case in the court below on June 24, 1918, it was stipulated in open court that the Atlantic Transport Company, the employer of the decedent, should pay to the libelants the sum of $4,000; the respondent the Navigazione Alta Italia maintaining that the Atlantic Transport Company was solely liable to the libelants, but waiving any objection to the making of a settlement and payment by the Atlantic Transport Company. The Navigazione Alta Italia reserved the right to claim and insist that the respondent the Atlantic Transport Company was solely liable.

The court then proceeded to hear the testimony produced on behalf of the Atlantic Transport Company; it being stipulated that the court should allow until September 1, 1918, for the filing in court of the depositions, a commission to take which had previously issued at the instance of the owner of the Monviso. When the respondent the Atlantic Transport Company had offered all its evidence and had completed its case, the learned judge who heard this case below decided that on the evidence then before him the stevedores were solely liable for the death of their employé, Stanislaw Jakubczak, and that it was unnecessary to hear the testimony of the witnesses for the Navigazione Alta Italia, or to await the return of the depositions from Italy before rendering a decree exonerating the owners of the Monviso. The court entered a decree in favor of the libelants for the sum of $4,000. The Atlantic Transport Company objected to the decree, and the case now comes here on appeal.

[1] This libel was brought under Lord Campbell's Act to recover for the death of Stanislaw Jakubczak, a stevedore workman employed by the Atlantic Transport Company, a stevedore company, who was injured while employed in loading dunnage mats in the hold of the steamship Monviso, on November 11, 1916, from which injuries he died shortly after. The Italian consul at Baltimore, representative of the Italian government and the charter, made the arrangements with the appellant to do the stevedore work, including the furnishing of winchmen. Under the arrangement the ship furnished the winches and tackle, and the stevedores arranged the rigging to suit themselves.

It appears that the appellant was in sole charge of loading the vessel, and further that the owners of the Monviso did not have any authority or control over the stevedores, or other employés. The holds of the vessel, except No. 2, had been loaded with grain, and the stevedores, anxious to complete the loading of the vessel, decided to put two

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gangs to work at hatch No. 2; hold No. 2 being empty. Winch No. 2 was not working, and in order to work two gangs the foreman of the appellant company decided to lead two lines of tackle to No. 1 winch, which was situated on the deck of the vessel forward of hatch No. 2 and aft of the foremast.

The winch was of the usual type as to size and power installed on vessels like the Monviso. Similar winches are in use on the steamships Cerea, Principessa Lactitia, and Soperga, other steamers of the fleet of the Navigazione Alta Italia. There is a drum in the center of the winch, and on each side a small and a large spool. The large spool on the port side of the vessel was used at the time the accident occurred. It further appears that the large spool was 17 inches in length, 18½ inches in diameter at the larger end of the spool, and 15 inches in diameter at the smaller end. The diameter of the spool at the outer rim was 3 inches greater than the diameter in the middle or smallest portion of the spool. The dimensions of the central drum do not appear. However, it is admitted that this drum was considerably larger than the spools of the winch, and was the portion of the winch designed and intended for use in loading heavy cargo. The spools of the winch were intended only for light loads, not exceeding 500 pounds. It was shown that the usual thing to do is to use the drum, it being the safest method in raising or lowering a cargo.

Therefore, there were two methods in which the winch could be operated, to wit, either by using the drum or the spools; the first being by making the fall fast to the drum of the winch. The slingload could then be raised or lowered by the winchman operating the steam levers of the winch. This is admitted to be the proper method where large weights were to be lifted. Second, by using a large spool with the rope fall, which will not make fast to the spool, the whip end being held by one of the stevedores, and several turns of the fall taken around the spool and back. To raise a slingload, the spool of the winch was revolved forward, towards the bow of the ship, winding up the fall attached to the sling, while the whip or loose end of the fall was held taut by a stevedore. To lower, this stevedore slacked away on the whip end. That method of "spooling" was adopted when desired to work two gangs, when only light loads were being used. It was the method which was tried by the stevedores at the time Jakubczak was injured, and was discarded, and the drum was used after the accident.

The tackle rigged this way had been used on the day in question to move some dunnage boards weighing 200 or 300 pounds, and had operated satisfactorily. There were a number of stevedores in the hold arranging the dunnage mats, and the first load of flour was waiting on the platform overlooking the hatch. A stage had been laid from the deck of the ship to the pier, forming an inclined plane upon which the first slingload of flour, consisting of 20 bags, weighing about a ton, had been dragged. In doing this the full weight of the slingload had not been placed upon the tackle.

It appears that the foreman of the appellant company was doubtful as to whether it was safe to use ton slingloads with the tackle rigged

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in accordance with his instructions. However, he decided to give it a trial and see how it worked, and directed that the large spool be used. "Go ahead," he said to the man at the winch, "Let us try it. Go ahead; let us give this a trial." The spool of the winch commenced to revolve, the load was dragged toward the hatch coaming, and when it swung over the open hatch the full weight of the slingload fell upon the spool. According to the testimony of Jim George, a witness for the stevedores, who held the whip end of the rope, there were some five or six turns of the fall around the spool, and when the weight hit the spool two turns came off the spool, the rope ran so fast that he could see the fire come off the spool, and his hands were burned through his gloves. The witness let go the rope and the ton of flour fell into the hold.

It appears that the workmen were busy loading dunnage mats on the floor of the hold below, and that no warning was given that the slingload of 20 bags was about to descend upon them. There was some conflict of testimony as to whether two turns of the fall slipped off over the end of the spool, or whether, as the slingload was lowered into the hold, the turns of the rope slipped around the spool so fast that the man holding the whip end was compelled to let go.

As we have stated, it was stipulated in the court below that the libelants were entitled to a decree, and the sole question submitted was whether the appellant or the appellee, Navigazione Alta Italia, as owner of the steamship Monviso, was responsible for the death, or whether they were both liable. Appellant insists that the appellee was negligent, in that he furnished a defective spool head. It is contended by counsel for appellant that it was the duty of appellee to furnish such tools and appliances as were necessary to the proper loading of the ship, and this is admitted by counsel for appellee. When appellant commenced to load the ship, it was informed by the ship's agents that it was very important to have the ship loaded as speedily as possible. Appellant insists that, upon inquiry as to appliances, it was directed by the ship's officers to use the spool heads that proved defective; that ordinarily the use of spool heads is a safe and customary practice; and it further appears that 500 pounds is an ordinary lift for a spool head. Appellant further insists that its employés on that occasion were capable and experienced men, and that, before lowering a load of flour, every reasonable precaution was taken to see that the way was clear, so as to avoid accidents.

However, appellee insists that, while it was his duty to furnish suitable appliances in good condition for the loading of the vessel and to maintain them in good condition, it performed its duty by furnishing appliances that were suitable and maintaining them in good condition. Appellee insists that appellant could have used the drum head, which it had furnished, and that it would have been a safe means of lowering the flour. Appellant's only excuse for not employing the drum head, which it admitted to be a safe method, is that appellee was exceedingly anxious to have the flour, as we have stated, loaded at the earliest possible moment.

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The controversy involved herein is within a narrow compass, involving as it does, only the question as to whether the appellee failed to perform the duty required of it, to wit, to furnish safe and suitable appliances with which to load the ship. Appellant contends that the spool head was defective, in that it did not have rims at either end, so as to prevent the rope from slipping after it reached a certain point in wrapping; and this raises the question as to whether, if the spool head was really defective, the defects were such as could have been observed by appellant by the exercise of due care. The appellant insists that the only—

"actionable negligence shown is the defectively constructed spool head, and the failure of the ship's officers to notify the appellant that this spool head could only be used safely for loading 500 pounds, when such spool heads can and are ordinarily safely used for a ton or more; that this fact was known to the ship, its officers being present at the time that the stevedores were placing a load of a ton in the sling."

The court below, in commenting upon the suggestion that the ship directed the stevedores to use a spool head, said:

"He was told to use the winch, and decided to use the spool head."

It also appears from the evidence that the chief officer and master both denied that they had given any direction or suggestion whatsoever as to the use of the spool head, stating at the time that it was not their duty to do so.

[2] In this connection it should be borne in mind that appellee fulfilled its duty by furnishing proper appliances, but did not give any instructions as to the use of same. The case of Jeffries v. De Hart, 102 Fed. 765, 42 C. C. A. 615, is very much in point. There the court found that the gear which broke, causing the injury, was selected, not by the owners of the ship, but by the stevedores themselves, who relied upon their own judgment as to its fitness. The court, in referring to this phase of the question, said:

"All that the mate of the vessel, or any other agent of De Hart, really did, was to passively permit the workmen of the Cronise Company to employ such part of the vessel's tackle as they saw proper, instead of furnishing the gear which, under the agreement the ship might have been required to furnish; but of this departure from the terms of the contract Jeffries could not have complained, for he was neither a party nor privy to it. Consequently, whatever duty of care was owing to him was, under the circumstances, due by his employer, the Cronise Company, and not by the ship or its owner. If the appliances were negligently selected, those who made the selection were at fault, and not the defendant in error, who neither by himself nor by any agent of his or of the ship participated in that selection, or was under any obligation to Jeffries to direct or control it."

A careful consideration of the testimony fails to show any act of negligence on the part of those in charge of the ship. The appellant, whose business it was to load and unload ships, no doubt had had much experience in such matters. Indeed, it is shown by the testimony that the men employed were capable and experienced in such matters.

In the case of The Persian Monarch, 55 Fed. 333, 5 C. C. A. 117, the stevedore was injured by the breaking of a rope used to haul the lighter alongside the ship. It appears that in that case the rope was se-

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lected by a foreman stevedore, but was unsuitable for the purpose. Judge Wallace, speaking for the Circuit Court of Appeals, Second Circuit, said:

"It was of course obligatory upon the steamship owner, as employer, to supply and maintain suitable instruments and means with which to enable the stevedores to carry on their work, and to exercise reasonable diligence to see that such appliances were at all times safe for use. It had fulfilled its general duty in that behalf; it had furnished all the requisite appliances for the various incidents of the service to be performed by the stevedores; and it is not asserted that any of these appliances were defective or unsafe for their appropriate uses. It was under no obligation of especial supervision, because the stevedores were experienced men, who knew which appliances to select and how to use them."

It being conceded that the use of the winch would have been a safe means of lowering the flour, and it further appearing that the appellant chose what proved to be a more dangerous method, clearly fixes the blame upon the appellant. If the spool head was defective, such defect, as we have stated, was open and obvious, and could have been easily discovered by the appellant in the exercise of ordinary care. The winch which had been furnished by the ship was at hand and ready for use, but with full knowledge as to the condition of the spool head the appellant chose to use the latter.

We fail to find any evidence to warrant us in finding that appellee was negligent in performing its duty. Therefore we must conclude that the accident was due to the negligence of the appellant, as found by the court below.

For the reason stated, the decree of the lower court should be affirmed.

(259 Fed. 28)

HINES, Major Field Artillery U. S. Army, v. MIKELL.

(Circuit Court of Appeals, Fourth Circuit. April 11, 1919.)

No. 1684.

1. HABEAS CORPUS ⟹54—SUFFICIENCY OF PETITION.

Where a petitioner for writ of habeas corpus is confined under a statute containing a number of provisions, on any one of which he may be detained, the petition must clearly set forth each provision, and must aver that neither of them applies to him.

2. WAR ⟹32—COURTS-MARTIAL—CIVILIANS AMENABLE TO JURISDICTION—RETAINERS WITH ARMIES "IN THE FIELD."

In Articles of War, Rev. St. § 1342, art. 2(d), as amended by Act Aug. 29, 1916, § 3 (Comp. St. § 2308a), providing that "in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field" shall be subject to military law, the phrase "in the field" is used in its technical military sense, and includes forces in cantonments or training camps within or without the United States.

[Ed. Note.—For other definitions, see Words and Phrases, In the Field.]

3. ARMY AND NAVY ⟹28—"POST"—"GARRISON."

A "post" or "garrison" is the permanent home of the army in time of peace, where soldiers are given proper training with a view of having them prepared for the intelligent performance of duty in event of conflict.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Post.]

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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Appeal from the District Court of the United States for the Eastern District of South Carolina, at Charleston; Henry A. Middleton Smith, Judge.

Habeas corpus by William E. Mikell against F. H. Hines, Major Field Artillery, United States army. Judgment granting writ, and respondent appeals. Reversed.

For opinion below, see 253 Fed. 817. Certiorari denied 250 U. S. —, 39 Sup. Ct. 494, 63 L. Ed. —.

Francis H. Weston, U. S. Atty., of Columbia, S. C., and M. J. Dougherty, 1st Lieut. F. A., U. S. Army, of Mesa, Ariz., Trial Judge Advocate (J. Waties Waring, Asst. U. S. Atty., of Charleston, S. C., and Capt. W. L. Martin, of Montgomery, Ala., Trial Judge Advocate, on the brief), for appellant.

R. Beverley Herbert and H. N. Edmunds, both of Columbia, S. C., for appellee.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. This was a habeas corpus proceeding tried in the United States District Court for the Eastern District of South Carolina. The facts may be epitomized as follows:

On or about July 22, 1917, William E. Mikell, a civilian, on his personal application, was employed by the quartermaster at Camp Jackson in the capacity of a stenographer.

Camp Jackson is a cantonment located near Columbia, S. C., established under the authority of the National Defense Act, approved June 3, 1916, c. 134, 39 Stat. 166, and amendments thereto. This camp was established for the training of the military forces of the United States for service in the theater of operations overseas.

Mikell continued in his employment until on or about March 15, 1918, when again, upon his personal application, he was employed as auditor of the constructing quartermaster's office, and his employment at such cantonment was continuous until his arrest and confinement, followed by his discharge on or about September 25, 1918. After he was arrested he was confined in the prison stockade, Camp Jackson, under order of the commanding general, charged with violation of the 94th Article of War (Comp. St. § 2308a).

Before he could be brought to trial by court-martial, he was released and discharged from military confinement, on a petition for writ of habeas corpus, by the United States District Court for that district. The government took an exception to the judgment of the lower court, and the case comes here now on appeal.

The first and second assignments of error are in the following language:

"That his honor erred in overruling the demurrer interposed to the petition because the said petition failed to state sufficient facts to entitle the petitioner to a writ of habeas corpus, or to have a rule to show cause issued."

"That his honor erred in overruling the demurrer interposed to the petition because the petition failed to show that the petitioner was not subject to the jurisdiction of a military court-martial."

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[1] Where one files a petition for habeas corpus it is incumbent upon him to show that his detention is unlawful; therefore, where as in this instance, one is confined under a statute containing a number of provisions, on any one of which he may be detained, the petition must clearly set forth each provision of the statute, and it must be averred that neither of them applies to him.

Among other things, the defendant stated the ground upon which he could not be lawfully held in the following language:

"That your petitioner is not an officer or soldier in any branch of the military or naval service of the United States, nor is your petitioner in any other wise subject to the military laws of the United States, nor has he in any wise committed any breach of the same, nor does he reside within the confines of said Camp Jackson, but, on the other hand, resides at his own home, in the county of Richland, state aforesaid."

Inasmuch as these two assignments are closely related, we will consider them together. As we have stated, where there are a number of elements of a statute which may warrant the detention of the petitioner, it is incumbent upon him to negative each provision.

The petitioner states, among other things, that he is "not otherwise subject to military laws of the United States." This is a mere conclusion of law. However, we prefer not to base our decision upon the ground that the demurrer should have been sustained. The principal point involved in this controversy is as to whether the appellee is amenable to court-martial jurisdiction.

[2] The section upon which the defendant was sought to be prosecuted is subdivision (d) of article 2, § 1342, Revised Statutes, as amended by the act of August 29, 1916, c. 418, § 3, 39 Stat. 650, 651 (Comp. St. § 2308a), and is in the following language:

"All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles."

In order to correctly determine the matter in controversy, we must ascertain the true meaning of the foregoing section. In other words, was the appellee "serving with the armies of the United States in the field * * * in time of war"?

Appellee admits that he was serving with the army at the time of his dismissal from the service, and that he was within the territorial jurisdiction of the United States in time of war; but he contends that the army in which he was serving was not "in the field," within the meaning of the act under which he was held.

It is insisted by counsel for the government that when we come to determine the meaning of the words "in the field" we should ascertain whether they "possess a technical as well as a meaning of common acceptation, and whether they are to receive their common accepted meaning or are to be construed in accordance to their technical import."

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The learned judge who tried this case in the court below, in referring to the meaning of the words "in the field," said:

"The ordinary meaning of the words 'field' or 'in the field,' with regard to military operations, means in the actual field of operations against the enemy; not necessarily the immediate field of battle, but the field of operations, so to say; the field of war; the territory so closely connected with the absolute struggle with the enemy that it is a part of the field of contest."

Is the interpretation placed upon this section by the lower court sufficiently broad to meet its requirements? Did the court interpret this section in the sense in which it is employed by military authorities? In other words, have not these words acquired a peculiar and appropriate meaning in the language of war? From the very nature of things, we think they should be given their technical meaning.

We find in 36 Cyc. 1118, the following:

"Terms of art, or technical words and phrases used in a statute," that "have acquired a peculiar and appropriate meaning in the law, must be interpreted in accordance with their received meaning and acceptation with the learned in the art, trade, or profession to which they belong, unless it clearly appears * * * that it was the intention of the Legislature to use them in a different sense."

[3] A post or garrison, properly speaking, is the permanent home of the army in time of peace, where soldiers are given proper training with a view of having them prepared for the intelligent performance of duty in the event of a conflict; and in case of war, when the army leaves the post and moves in the direction of the enemy, or to some intermediate point where they may temporarily stop for training, would it not be more reasonable to say that they were then "in the field"?

In the United States Army Regulations (paragraph 193 et seq., p. 48) it is provided for field service in time of peace:

"In time of peace a department commander is charged, under direction of the War Department, with the duty of preparing for war all the troops and all the military resources of his department, and with the administration of all the military affairs of his department, except as otherwise prescribed by army regulations or existing orders. * * * He will annually concentrate his tactical division, or portions thereof, and secure for himself, and his division staff, as much practice as possible in the actual handling and supply of troops in the field. * * * The object of such inspections is to determine the preparedness of organizations for war service, and the capacity of brigade commanders and all other officers for the exercise in the field of command appropriate to their rank. With this object constantly in view, the character of the inspection may be varied by the department commander, and any exercise may be required which may be necessary to arrive at definite conclusions and to justify positive recommendations; but tactical inspections will ordinarily embrace the following subject: * * *

"(i) Drill regulations; combat exercise appropriate to the size of the command.

"(j) Field fortification, including the reconnaissance, selection, and occupation of defensive positions, the actual construction of appropriate intrenchments, when practicable, and the rendition of reports, including the necessary sketches, based on standard publications and service manuals treating of the subject of field fortifications."

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In Infantry Drill Regulations, United States Army (page 10), the distinction between garrison and "in the field" is recognized in the following language:

Field exercises are for instruction in duties incident to campaign. Assumed situations are employed. Each exercise should conclude with a discussion on the ground of the exercises and principles involved.

The combat exercise, a form of field exercise of the company, battalion, and larger units, consists of the application of tactical principles to assumed situations, employing in the execution the appropriate formations and movements of close and extended order.

Combat exercises must simulate, as far as possible, the battle condition assumed. In order to familiarize both officers and men with such conditions, companies and battalions will frequently be consolidated to provide war-strength organizations. Officers and noncommissioned officers not required to complete the full quota of the units participating are assigned as observers or umpires.

The firing line can rarely be controlled by the voice alone; thorough training to insure the proper use of prescribed signals is necessary.

The exercise should be followed by a brief drill at attention in order to restore smartness and control.

In field exercises the enemy is said to be "imaginary" when his position and force are merely assumed; "outlined," when his position and force are indicated by a few men; "represented," when a body of troops acts as such.

The court below treated the term "in the field" as describing a place of contact with the enemy. It necessarily limits the term "in the field" to those who were in the theater of operations in the foreign service. We think that General Orders 6, 53, December 11, 1918, shows there is a required distinction between the term "in the field" and the places of contact with the enemy, in which reference is made to service chevrons as follows:

"A gold chevron of standard material and design, to be worn on the lower half of the left sleeve of all uniform coats, except fatigue coats, by each officer, field clerk, and enlisted man who has served six months *in a theater of operations* during the present war as an officer, field clerk, or enlisted man of the armies of the United States, and an additional gold chevron for each six months of similar service thereafter.

"A sky-blue chevron of the same pattern, and worn in the same manner as the gold chevron, by each officer, field clerk, and enlisted man who has served under the conditions prescribed for the gold chevron, but has left *the theater of operations* prior to the completion of six months' service therein. Should a person subsequently return to the theater of operations for duty therein, the blue-cloth chevron will be replaced by the gold chevron upon the completion of a total six months of service *in the theater* of operations, after which only gold chevrons will be worn to indicate war service. The right to wear war-service chevrons is limited to those officers, field clerks, and enlisted men whose official duty requires their presence in a theater of operations, as distinguished from those who may visit such a theater without having been ordered thereto for duty. The term 'theater of operations' is as defined in Field Service Regulations 1914, as corrected to April 15, 1917. * * *

"A silver chevron of the same pattern, and worn in the same manner as the gold chevron, by each officer, field clerk, and enlisted man who has served for six months during the present war outside the theater of operations, and an additional silver chevron for each six months of similar service thereafter. The silver chevron will not be worn by those required to wear either the gold or blue-service chevron.

"Chevrons of the same material and design and similarly placed will be worn on the coat, overcoat, or waist of their prescribed uniform by all other uniformed personnel of the authorized military establishment. They will be

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worn under the same conditions as prescribed for officers, field clerks, and enlisted men."

In time of war, with some exceptions, practically the entire army is "in the field," but not necessarily "in the theater of operations." This would be undoubtedly true in case of war within our borders, and we can conceive of no reason why the army in America engaged in training and preparing for service on the firing line overseas should not be considered and treated as a component part of the entire army, the majority of whom were actually engaged on the firing line. To maintain those who were "over there," it was necessary to have a reserve force located so near thereto as to be available in the case of an emergency, and during the war just ended it was very essential that they should continue to increase such reserve force under the selective draft, and in order to do this the individual had to be mustered into the service and undergo strict discipline and training so that he might render efficient service under the modern mode of warfare. It seems perfectly clear that from the moment he entered the service he was in every sense of the word a part of the army, and when he was taken to the cantonment he thereby was serving with the army "in the field," doing practically everything required of a soldier save that of engaging in actual combat. All the training he received was for the purpose, as we have stated, of qualifying him for the contest that was going on, as we all know, at a fearful rate.

If an individual during peace had enlisted at an army post he could not, so long as he remained there, in any sense of the word be deemed to be engaged in the service "in the field." However, those who entered the cantonment took the first step which was to lead them to the firing line, and they were then as much "in the field" in pursuance of such training as those who were encamped on the fields of Flanders awaiting orders to enter the engagement.

In the case of Sargent v. Town of Ludlow, 42 Vt. 726, the Supreme Court of that state said:

"That term 'in the field' has just as clear and well-defined a meaning when used with army service in a state of war as any other plain and well understood expression. 'Soldiers in the field,' 'veterans in the field,' 'men in the field,' 'army in the field,' 'officers in the field,' 'all mean persons in the military service for the purpose of carrying on the pending war.'"

In 1893 Congress by the act of February 27th of that year (chapter 168, 27 Stat. 480 [Comp. St. § 2122]) clearly indicated that the army may be "in the field" in time of peace, and passed an act giving them the right to hold their quarters, or to receive commutation in lieu thereof, when temporarily on duty in the field; and when war was declared with Germany many of the officers while engaged in the field were not entitled to quarters or commutation, etc., because they had not been assigned to such quarters or posts. Accordingly Congress on April 16, 1918, c. 53, 40 Stat. 530 (Comp. St. 1918, § 2118bb), in order to relieve the situation, passed an act which provides:

"That during the present emergency every commissioned officer of the army of the United States on duty in the field, or on active duty without the territorial jurisdiction of the United States, who maintains a place of abode for a

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wife, child, or dependent parent, shall be furnished at the place where he maintains such place of abode, without regard to personal quarters furnished him elsewhere, the number of rooms prescribed by the act of March second, nineteen hundred and seven (Thirty-Fourth Statutes, page eleven hundred and sixty-nine), to be occupied by, and only so long as occupied by, said wife, child, or dependent parent; and in case such quarters are not available every such commissioned officer shall be paid commutation thereof and commutation for heat and light at the rate authorized by law in cases where public quarters are not available; but nothing in this act shall be so construed as to reduce the allowances now authorized by law for any person in the army."

From this statute it appears that Congress is of opinion that any portion of the army confined to field training in the United States should be treated as "in the field." There are other statutes almost too numerous to mention which clearly indicate that troops in cantonments in this country are "in the field." It is also significant that in May, 1918, the Secretary of War, through the Adjutant General, recognized the service in the various camps and cantonments "in the field," stating that officers stationed in these camps and cantonments were entitled to commutation of quarters, heat and light, for themselves and dependents.

The following excerpt is taken from the Bulletin of June 15, 1918, issued by the War Department:

"All duty with troops of any kind in the field, at home or abroad, during the present war, will be considered as not temporary duty in the field in contemplation of the act of Congress approved February 27, 1893, which provides that officers temporarily absent on duty in the field shall not lose their right to quarters commutation thereof at their permanent stations while so temporarily absent. Under this decision no officer or enlisted man on duty in the field can have any official station elsewhere, within the meaning and contemplation of the laws and regulations relating to the allowance of quarters or commutation thereof, but while on such duty his rights as to quarters will be as prescribed for field service. (2607909A, A. G. O.)"

We think, in view of the technical and common acceptation of the term, this question is not to be determined by the locality in which the army may be found, but rather by the activity in which it may be engaged at any particular time. This interpretation is fully sustained by the opinion of the Judge Advocate General, as follows: Ops. J. A. G. 6–124—.4, July 6, 1914; 24 Comp. Dec. 106; J. A. G. 248, 5, Apr. 2, 1918.

Judge Advocate General Holt on March 18, 1865, in the case of Dr. J. W. Bryan, a contract surgeon on general duty at a hospital at Beverly, N. J., who was charged with theft and violation of the 99th Article of War (Rev. St. § 1342), said:

"To restrict the term 'serving with armies of the United States in the field' to those persons only who may be employed with an army when immediately operating against the enemy would be a construction not in accordance with the spirit of our military law, and not in keeping with the necessities of our military establishment. In view of the constant and pressing exigencies of the military service, of the manifold duties which our officers and soldiers are called upon to perform, both at and away from the immediate front, and if the part that the troops themselves are assigned to perform, these indifferently, and under the same rules of discipline and code of laws, it is deemed not too much to hold that the entire army, as at present mobilized and actively employed for the prosecution of a Civil War and for the suppression of a vast

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internecine rebellion, is an army in the field; and that all persons engaged with it, whether in the camp or at a station, upon services made regular and proper by the wants and circumstances of the military body, are triable by a court-martial within the provisions of this article."

There are numerous other cases of the same import, but we do not deem it necessary to cite them in order to sustain the view we take of this matter.

It is a matter of common knowledge that Camp Jackson is a temporary cantonment, where troops are assembled from the various sections for the purpose of training preparatory for service in the actual theater of war. To hold that a cantonment like this is not within military jurisdiction would handicap the military authorities, and greatly hinder and delay military operations, and would, in some instances, enable one employed in such capacity to successfully defraud the government without incurring any criminal liability whatsoever. We think that all persons serving there are strictly "in the field" and subject to military regulations. The statute under which appellee was indicted is evidently intended to regulate the conduct of civilians who might seek employment in any branch of the service. This provision is highly proper, and manifestly intended to secure honest and fair dealing on the part of those employed by the government and should be rigidly enforced.

For the reason stated we are of the opinion that the court below was in error in discharging the defendant; therefore the judgment of such court is reversed.

(259 Fed. 35)

HUFFMAN v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. April 28, 1919.)

No. 5165.

1. INDICTMENT AND INFORMATION ⟹110(51)—SUFFICIENCY—STATUTORY LANGUAGE—WHITE SLAVE TRAFFIC ACT.

   An indictment for violation of White Slave Traffic Act, § 2 (Comp. St. § 8813), *held* good, where it charged the offense in the language of the statute.

2. CRIMINAL LAW ⟹1044—REVIEW BY APPELLATE COURT—ERRORS WAIVED IN LOWER COURT.

   Ruling on a motion by defendant for direction of a verdict, made at the close of the government's case, cannot be assigned for error, unless the motion is renewed at the close of all the evidence.

3. PROSTITUTION ⟹4—INTERSTATE COMMERCE—WHITE SLAVE TRAFFIC ACT—EVIDENCE.

   Evidence *held* to sustain a conviction for violation of the White Slave Traffic Act (Comp. St. §§ 8812–8819), by causing a girl to be transported in interstate commerce for immoral purposes.

4. CRIMINAL LAW ⟹878(3)—TRIAL—VERDICT.

   Since the commission of an offense in different ways may be charged in separate counts of an indictment, to meet the proof, an acquittal on one count does not invalidate a conviction on another.

Sanborn, Circuit Judge, dissenting.

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In Error to the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Criminal prosecution by the United States against Charles W. Huffman. Judgment of conviction, and defendant brings error. Affirmed.

Charles A. Irwin, of Denver, Colo., for plaintiff in error.

Harry B. Tedrow, U. S. Atty., of Boulder, Colo., and Otto Bock, Asst. U. S. Atty., of Denver, Colo.

Before SANBORN and STONE, Circuit Judges, and ELLIOTT, District Judge.

ELLIOTT, District Judge. The plaintiff in error was charged with a violation of the act of Congress of June 25, 1910, known as the Mann Act (36 Stat. 825, c. 395 [Comp. St. §§ 8812–8819]), in an indictment containing four counts. Upon a plea of "not guilty" and a trial, a verdict of "guilty" was returned upon the first count of the indictment, and "not guilty" upon the remaining three counts. Motions for a new trial and in arrest of judgment were denied, and the defendant duly sentenced.

[1] Notwithstanding no demurrer was filed and no objection in any manner made to the form of the indictment, the first objection that is now urged by plaintiff in error is the insufficiency of the indictment, in that—

"The indictment does not allege that Gladys Overlander was transported in interstate commerce."

He predicates this contention in his brief upon the statement that—

"Count first of the indictment, in the case at bar, is based upon the second clause of the second section of the Mann Act."

This is clearly an erroneous assumption. Count 1 of the indictment is based on the first clause of section 2 of the act of June 25, 1910. This first clause of said section of said act, in so far as it is material to said first count, is as follows:

"Any person who shall knowingly * * * cause to be transported * * * in interstate * * * commerce * * * any woman or girl * * * with the intent and purpose to induce, entice, or compel such woman * * * to engage in any other immoral practice, * * *" shall be deemed guilty, etc.

This count in the indictment follows the language of the statute, fixes the date of the offense as April 11, 1917, the place as the city of East Palestine, in the county of Columbiana, in the state of Ohio, and in the language of the statute alleges that he—

"did * * * cause a certain girl, namely, Gladys M. Overlander, to be transported in interstate commerce from said city of East Palestine, in the state of Ohio, to the city and county of Denver, in the state and district of Colorado."

The second clause of said section 2 of said act specifically refers to procuring or obtaining tickets to be used by any woman or girl in interstate commerce, etc., and to that clause is added the words,

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"whereby any such woman or girl shall be transported in interstate or foreign commerce," etc. Clearly it is not the intent and purpose to justify a conviction of an offense under the second clause of the second section of the act by simply showing the procuring of the tickets or other transportation, or the furnishing of the money to buy the same, to be used by any woman or girl in interstate commerce; but it must further appear, under that clause, that the woman, for whom such tickets or transportation was furnished, was actually transported in interstate or foreign commerce, under such ticket, and for the purposes named in the act. We think the phrase, "whereby any such woman or girl shall be transported in interstate commerce," as used in the second clause of said section 2 of the act, in no wise modifies or is intended to be a part of the description of the offenses named in the first clause of said section 2.

This offense is statutory, and we must look to the language of the statute for the ingredients of the offense. The said first count of the indictment in the case at bar charges the offense in the language of the statute, and is therefore sufficient. U. S. v. Gooding, 12 Wheat. 460, 6 L. Ed. 693; Potter v. U. S., 155 U. S. 438, 15 Sup. Ct. 144, 39 L. Ed. 214; Burton v. U. S., 202 U. S. 344, 26 Sup. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 392.

We think the count in question contained every element of the offense intended to be charged; that it was sufficient to notify the defendant of what he was charged with, and therefore what he must be prepared to meet; and upon its face accurately revealed to what extent an acquittal or conviction upon that count of the indictment might be pleaded, in the event of other proceedings for the same or a similar offense. Cochran v. U. S., 157 U. S. 286, 15 Sup. Ct. 628, 39 L. Ed. 704.

[2] The second contention of the plaintiff in error is that the evidence was not sufficient to justify the verdict. The record discloses that at the close of the government's case the defendant moved for a directed verdict of "not guilty," on the ground that the evidence failed to support the allegations of said first count, but this motion was overruled.

This motion was not renewed at the close of the defendant's case, and there was therefore no ruling of the trial court upon which such an assignment could be based. Defendant's failure to renew his motion at the close of all of the evidence waived this question, and there was no exception to the charge of the court. There is therefore really nothing to be considered, except the last contention of the plaintiff in error.

[3] However, as both parties argued the question, it is within the sound discretion of this court to notice the claim of counsel for plaintiff in error that there was no evidence to sustain the verdict of "guilty," although the question was not raised in the trial court. Doe v. U. S., 253 Fed. 903, 166 C. C. A. 3, and cases there cited.

Plaintiff in error seems to place some emphasis upon the language of the indictment, that the defendant "did * * * cause a cer-

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tain girl, namely, Gladys M. Overlander, to be transported," etc., and to attribute to the word "cause" a meaning out of the ordinary.

For the purpose of a construction of this statute, it would seem that Webster's definition, "to cause a thing is to effect it as an agent; to bring it about"—is sufficient, and therefore, in the determination of the sufficiency of the evidence to sustain the verdict, the question becomes one of whether or not under all the testimony, with the reasonable inferences that the jury might logically and reasonably draw therefrom, there was sufficient to sustain this allegation of the indictment that the defendant "caused" the transportation of this girl in interstate commerce from the point named to Denver, Colo., for the purpose therein set forth.

The testimony reveals that the defendant, about 40 years of age, was the pastor of a church at East Palestine, Ohio, the home of Gladys Overlander, about 18 years of age and a member of his church; that he had been her pastor, as well as that of her family, for 2½ years prior to the date named in the indictment; that the defendant was a married man; that the defendant went to the home of Gladys in the absence of her parents at various times, and sustained illicit relations with her, usually on Wednesday nights, when her mother attended the Ladies' Aid; that the defendant discussed with Gladys the matter of leaving East Palestine for the West a half dozen times, the defendant commencing such conversations; that defendant resigned his pastorate on Easter Sunday, April 8, 1917, and on the following Tuesday he met Gladys and told her he was going to take his wife to Akron that evening, that he would then go to Pittsburgh the next day, and that she should follow him on the next train, and should meet him at the Union Depot at Pittsburgh, and from there they would go on West as far as his money would carry them. She testifies that at the time of that conversation he further stated that, if she did not follow him, he would come back the next day for her; that in these conversations the defendant had stated to her that they would live as man and wife in the West. Gladys stated that she was afraid that, if she did not go with him, the defendant would compel her to go, and that he made a threat that she must go with him. She did leave East Palestine on the next day on the next train for Pittsburgh, and there met the defendant at the Union Depot, in accordance with the arrangement that she says he made with her the day before. They left Pittsburgh together at 6 p. m. on the same day, for Columbus, Ohio, via the Panhandle Railroad, defendant paying for the transportation, arriving at Columbus at midnight, and the defendant registering them at the Majestic Hotel as man and wife under an assumed name. The next morning they left Columbus for St. Louis, Mo., via railroad, defendant paying for the transportation, and they arrived at St. Louis the same day. Defendant registered them at the Majestic Hotel under an assumed name, as man and wife, and they stayed there that night and the following day, which was Sunday, and until Monday morning. Sunday afternoon they obtained a map, traced the lines to the West, and the defendant thereupon informed Gladys, "I guess we will go to Denver." It was testified that that was as far

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as the money would carry them. On Monday morning they left for Denver, via railway, defendant paying for the transportation, arriving at Denver, Colo., on Wednesday, and he registered them at the Oxford Hotel as man and wife under an assumed name. It is undisputed, and shown by the testimony of witnesses other than Gladys and the defendant, that thereafter they engaged in the practice of illicit relations, renting rooms and living there together as man and wife. The defendant admitted to the chief of police of Denver that he paid for the transportation for Gladys to Denver, and shortly after reaching Denver wrote a letter to the parents of Gladys, in which he stated that the girl was innocent, etc.

We think this evidence, with the inferences that necessarily must reasonably be drawn therefrom, amply sustains the verdict of guilty as charged in the first count of this indictment. It was for the jury to consider and determine the sufficiency of the evidence. This testimony, both the direct and circumstantial, with the reasonable inferences to be drawn therefrom, justified the jury in finding that the intent and purpose of the defendant, prior to leaving East Palestine, was to engage in the practice of illicit sexual intercourse with Gladys Overlander after transporting her in interstate commerce to Denver, as alleged.

The contention is made that the evidence does not definitely fix the place of their destination at Denver, Colo. It is true that the first time that Denver, Colo., was mentioned by the defendant was while they were en route, and at St. Louis; but the evidence does conclusively show the intent and purpose to take her as far West as the money would carry them, and that they should live as man and wife wherever they went, and that this transportation of this girl was to be by interstate commerce and for that prohibited purpose. It is admitted that Denver was as far as the money would carry them, and that he carried out the intent and purpose with which it is alleged he caused her transportation. His intent and purpose was necessarily judged by the jury from his acts, declarations, and conduct, what he said prior to leaving East Palestine, statements made en route and after he arrived at Denver, Colo., taking into account his actions, his conduct, before starting, en route, and at the latter city. His acts and declarations at Denver might be relevant to throw light upon his state of mind and his will, while he was furnishing the transportation and persuading the girl to take the interstate journey in question. We are of the opinion that there was substantial evidence to sustain the conviction under the first count of the indictment.

[4] The third and last contention of the plaintiff in error is that the verdict and judgment of not guilty on the second count of the indictment is an adjudication that the defendant was not guilty upon the first count thereof, and that the verdicts of not guilty on the third and fourth counts of the indictment are inconsistent with the verdict of guilty on the first count, and that the judgments of acquittal upon the third and fourth counts require a judgment of acquittal upon the first.

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The second count is identical with the first, except the change in the date (two days later) and the allegation that the defendant on that date, at the city of St. Louis, in the state of Missouri, caused the transportation, etc., to the city and county of Denver.

The third count is under the second clause of section 2 of the act, and charges that the defendant persuaded, induced, and enticed the same girl to go in interstate commerce from East Palestine, Ohio, to Denver, Colo., and caused her to go and to be transported in interstate commerce, as a passenger, from East Palestine to Denver, for the purposes named in the first count.

The fourth count is the same as the third, and is drawn under the second clause of said section 2 of said act, differing from the third, in that it alleges that the defendant did persuade, induce, entice, and coerce the same girl to go in interstate commerce from St. Louis, Mo., to Denver, Colo., as a passenger in interstate commerce, for the purposes named in the preceding count.

These objections may be considered together. It will be noted from the above brief statement that the four counts in the indictment are for the same transaction; but the allegations of each count are stated within a distinct, separate provision of the same statute, and each is entirely independent of the others. This is good pleading, and is permissible by express statute of the United States. R. S. § 1024; section 1690, U. S. Comp. Stat. 1916.

The purpose of pleading the same transaction in several counts as to the manner or means of its commission is to avoid at the trial an acquittal by reason of any unforeseen lack of harmony between the allegations and the proofs. In Dealy v. U. S., 152 U. S. 542, 14 Sup. Ct. 681, 38 L. Ed. 545, the Supreme Court of the United States said:

"The discharge of the jury under the circumstances was doubtless equivalent to a verdict of not guilty as to that count. Upon this, defendant's counsel say that the only offense charged is conspiracy, that 'the indictment amounts to but one count, and one charge of conspiracy, with 17 different overt acts,' and that an acquittal on one count acquits him of the single offense charged in all the counts. But this is obviously a mistake. It is familiar law that separate counts are united in one indictment, either because entirely separate and distinct offenses are intended to be charged, or because the pleader, having in mind but a single offense, varies the statement in the several counts as to the manner or means of its commission, in order to avoid at the trial an acquittal by reason of any unforeseen lack of harmony between the allegations and the proofs"—citing 1 Bishop on Criminal Procedure, § 422.

Continuing, the court said:

"Yet, whatever the purpose may be, each count is in form a distinct charge of a separate offense, and hence the verdict of guilty or not guilty as to it is not responsive to the charge in any other count."

In Corbin v. U. S., 205 Fed. 278, 125 C. C. A. 114, the defendant, a postmaster, was charged with a violation of section 225 of the Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1133 [Comp. St. § 10395]), in that he unlawfully, etc., converted to his own use and embezzled a specific sum of money belonging to the United States, which "came

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into his hands and under his control in the execution and by virtue of his said office as postmaster." In the second count the accused was charged with embezzling the same amount of money, which he had in his official possession or control, by failing to remit or deposit it as required by law. The trial court, at the time of submitting the case to the jury, withdrew the latter charge from their consideration and directed an acquittal upon that count of the indictment. The defendant was convicted upon the first count of the indictment, and it was then contended that the verdict of guilty on the first count and not guilty on the second count was inconsistent and repugnant, and therefore, void. This court stated:

"If we could assume that the money described in the two counts was the same, which we cannot do, because the evidence is not before us, a common instance of charging in separate counts different ways of committing the same offense would be presented. * * * In such a case the withdrawal of one count, by directing a verdict at the final submission of the case, does not affect the other. Here there was a single verdict covering both counts, not a prior acquittal of the same offense, and the rights of the accused were not prejudiced."

This principle, as applied there, is entirely consistent with the situation presented in the case at bar, and applies with equal force. That a number of charges of violations of a United States statute may be joined in one indictment, the several charges being based on acts connected with the other and for transactions of the same class of crime, see opinion of this court in Kreuzer v. U. S., 254 Fed. 34, 165 C. C. A. 444.

In a recent case, this court was called upon to consider the effect of acquittal upon some of the counts of an indictment, and conviction upon the remaining count. Boone v. U. S., 257 Fed. 963, 169 C. C. A. 113 (March 8, 1919). In that case violations of section 5209 of the Revised Statutes of the United States (Comp. St. § 9772) were alleged. Upon trial the jury returned a verdict of not guilty on the first eight counts, and of guilty on the ninth count. Judge Trieber, in the majority opinion, used the following language:

"It is true, as claimed by counsel, that the evidence as to some of the other counts, especially the sixth and eighth, on which the defendant was acquitted, is stronger against the defendant than that on this count; but it was for the jury to determine on what counts, if any, the defendant should be found guilty, and he certainly cannot complain of not having been found guilty on these counts. It is a well-known fact that juries frequently hesitate to return verdicts of guilty on a large number of counts, when the punishment which may be imposed on each count is as severe as that provided for violations of this statute (the minimum punishment on each count is five years); they therefore satisfy their consciences by a verdict of guilty on one or two counts, and not always on the counts supported by the strongest evidence."

This expression of this court, we think, is an acknowledgment of the procedure plainly stated by the Supreme Court of the United States in Dealy v. U. S., supra, permitting separate counts to be united in one indictment, either because entirely separate and distinct offenses are intended to be charged, or because the pleader, having in mind but a single offense, varies the statement in the several counts as to the manner or means of its commission, in order to avoid, at the trial, an

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acquittal by reason of any unforeseen lack of harmony between the allegations and the proofs.

We find no prejudicial error in the trial of this case, and the judgment is therefore affirmed.

SANBORN, Circuit Judge (dissenting). The first and third counts of the indictment in this case seem to me to charge the same offense in words which have the same meaning and legal effect, and the jury by its finding that the defendant was guilty of the offense charged in the first count, and was not guilty of the offense charged in the third count, appears to me to have found that at the same time and place he was both guilty and not guilty of the same identical offense. The material parts of these counts are these:

The first count charges:

That Huffman, on April 11, 1917, "at the city of East Palestine, in the county of Columbiana, in the state of Ohio, did knowingly, willfully, unlawfully, and feloniously cause a certain girl, namely, * * * to be transported in interstate commerce from said city of East Palestine, in the state of Ohio, to the city and county of Denver, in the state and district of Colorado, and within the jurisdiction of this court, as a passenger upon the lines of certain common carriers engaged in interstate commerce (the names of which common carriers are to the grand jurors unknown), with the intent and purpose on the part of him, said Charles W. Huffman, alias Wilbur Huff, to induce, entice and compel her * * * to engage in an immoral practice * * * with him, said Charles W. Huffman, alias Wilbur Huff, at said city and county of Denver."

The third count charges:

That Huffman, on April 11, 1917, "at the city of East Palestine, in the county of Columbiana, in the state of Ohio, did knowingly, willfully, unlawfully, and feloniously *persuade, induce, and entice* a certain girl, namely, [the same girl named in the first count,] *to go* in interstate commerce from said city of East Palestine, in the state of Ohio, to the city and county of Denver, in the state and district of Colorado, and within the jurisdiction of this court, as a passenger upon the lines of certain common carriers engaged in interstate commerce (the names of which said common carriers are to the grand jurors unknown), with the intent and purpose on the part of him, said Charles W. Huffman, alias Wilbur Huff, to persuade, induce, entice, and coerce her * * * to engage in an immoral practice * * * with him, said Charles W. Huffman, alias Wilbur Huff, *and that said Charles W. Huffman, alias Wilbur Huff, then and there and by means of such persuading, inducing, enticing, and coercing* did knowingly cause said girl *to go and be carried and* transported from said city of East Palestine, in the state of Ohio, to said city and county of Denver, in the state of Colorado, as a passenger in interstate commerce upon the lines of certain common carriers engaged in interstate commerce (the names of which said common carriers are to the grand jurors unknown)."

All the words and terms used in the first count of this indictment are found in the second count; many of them are found there twice. These words charged that Huffman willfully caused the girl to be transported in interstate commerce from East Palestine to Denver, with the intent to induce her to engage in an immoral act with him at that place. Exactly the same charge is made in the third count of the indictment. All the words and terms used in this third count that were not used in the first count are italicized above, in order that

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the identity of the offense charged in the two counts may be more readily perceived. The only words in the third count not found in the first are the words "persuade, induce, and entice," where, in place of these words, the word "cause" is used in the first count; the words "and that said Charles W. Huffman, alias said Wilbur Huff, then and there, by means of such persuading, inducing, enticing, and coercing," and the words "to go and be carried and" in the sentence which charges that by means of such persuasion and coercion Huffman caused the girl to go, be carried, and transported from East Palestine to Denver.

So it is that the first count charges that Huffman caused the girl to be transported from East Palestine to Denver for the unlawful purpose. Under that count, evidence that he caused her to go and to be transported by his persuasion, inducement, enticement, and coercion was legally competent; there was no evidence in the case that he caused her to go or to be transported in any other way; the jury, by its verdict on the third count, found that Huffman did not cause the girl to go or to be transported by his persuasion, inducement, enticement or coercion. And as there is no evidence that he caused her to go or to be transported by any other means, as the legal presumption is that the accused is innocent until he is found guilty, as a finding by a jury of guilt and innocence of the same offense at the same time certainly cannot overcome the legal presumption of innocence, and as in my opinion the jury in this case has found the defendant innocent, as well as guilty, of the same offense charged in each of these two counts, I cannot bring myself to concur in the affirmance of a judgment against him for an offense for which the jury seems to me to have utterly failed legally to condemn him.

(259 Fed. 43)

HOPKINS et al. v. ZEIGLER.

(Circuit Court of Appeals, Sixth Circuit. May 7, 1919. On Rehearing, June 30, 1919.)

No. 3267.

1. LANDLORD AND TENANT ⟹44(1)—LEASE—COVENANTS—CONSTRUCTION.

A covenant that a lessee will do one thing or will do another thing may impose a binding obligation, although in the alternative, and does not necessarily import any fatally optional or unilateral character, and is not inappropriate to a lease which grants a vested interest; but a lease which does not take effect unless the lessee does a certain act is only executory, and is inoperative if the condition is not performed.

2. MINES AND MINERALS ⟹79(6)—OIL AND GAS LEASE—CONSTRUCTION.

A Kentucky oil and gas lease construed, and a provision that "second party agrees to complete a well on the premises within one year * * * unless the lessee thereafter pays a rental * * * payable quarterly in advance, until a well is completed, * * * which payments shall fully and completely extend this lease," *held* to state alternative conditions, a failure to comply with which, in view of the decisions of the highest court of the state, terminated all interest of lessee at the end of the first year.

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3. MINES AND MINERALS ⟹81—OIL AND GAS LEASES—CONFLICTING CLAIMS.

A second lessee, who took an oil and gas lease with knowledge of a prior unrecorded lease, but which he was told by lessor had expired for failure to do development work, which was the fact, and who expended $4,000 in developing the property within three months, *held* to have not only the superior title, but equities not inferior to those of the first lessees, who through mischance failed to make a payment which would have extended their lease.

On Rehearing.

4. COURTS ⟹405(18)—REHEARING IN CIRCUIT COURT OF APPEALS—CONFLICTING DECISIONS.

That, since the rendition of an opinion by the Circuit Court of Appeals, the highest appellate court of the state, having cognizance of such opinion, has reached a contrary conclusion in another case, is not ground for a rehearing, especially where the facts involved in the state case may have presented a ground of distinction between the two cases.

Appeal from the District Court of the United States for the Eastern District of Kentucky; Andrew M. J. Cochran, Judge.

Suit in equity by H. J. Zeigler and another against James S. Hopkins and others. Decree for complainants (258 Fed. 467), and defendants appeal. Reversed.

Mrs. Emma Hamilton was (for the purposes of this case) the owner of 50 acres of land in eastern Kentucky, in a region adjoining one where oil and gas had been found. On March 2, 1916, she signed the oil and gas lease set out in the margin.[1] The rights of Gibson, the lessee, later passed to Zeigler and

[1] "Agreement and lease, made and entered into the 2d day of March, A. D. 1916:

"Witnesseth, that Emma Hamilton, widow, lessor, in consideration of one dollar to us in hand duly and truly paid by W. J. Gibson, lessee, the receipt of which is hereby acknowledged, do hereby grant, demise, and let unto the lessee all the oil and gas in and under the following described tract of land; also the said tract of land for the purpose of entering upon, operating thereon, and removing therefrom said oil and gas, for the term of ten years from date, and as much longer thereafter as oil and gas is found thereon, with the right to use oil, gas, or water therefrom and all rights and privileges necessary or convenient for such operations, also the right to remove at any time all property, pipes, and improvements placed or erected in or upon said land by the lessee. Said land being all that certain tract of land situate in Willow voting precinct, ——— township, Lee county, state of Kentucky, bounded on north by Ingram Rader, east by Miller Rader, south by William Rader, west by Frank Callahan, bounded and described as follows, to wit: Containing 50 acres more or less. Hereby releasing and waiving all rights of the homestead exemption law of this state. The above grant or lease was made upon the following terms:

"First. Lessee agrees to drill a well upon said premises within one year from this date, or thereafter pay to lessors rentals as hereinafter provided until a well is completed or the property hereby granted is reconveyed to lessors.

"Second. Should oil be found in paying quantities, the lessee agrees to deliver to the lessors free of charge, into tanks or pipe lines, one-eighth part or share of all crude oil produced or saved from said premises.

"Third. Should gas be found in paying quantities, the lessee agrees to pay $100 each year for the product of each well while the same is being sold off the premises. The lessor to have gas free of cost to heat and light one dwelling house during the same time at the well, to be used at the lessors' risk.

"Fourth. The lessee further agrees to bury pipe lines for oil in cultivated

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Howell. They did nothing toward exploration, but on February 25—five days before the first year expired—they deposited in the post office a letter addressed to Mrs. Hamilton, at her post office address, with $1.25 to cover the so-called rental of the land in advance from March 2 to June 2, 1917. This never reached her, but was returned by the post office to them, and they deposited the same to her credit in the bank, as specified in the lease; but such deposit was not made until March 12—10 days after the year expired.

On March 7, 1917, Mrs. Hamilton gave, upon the same land, an exploration lease, the character and terms of which are in no way involved, to A. R. Putnam, who was representing himself and A. J. & J. S. Hopkins. She told him she had given a previous lease to some one, she did not know to whom, but that it was for a year, and had expired. Putnam went to the records, but did not find this previous lease. He and his associates then proceeded with exploration and development work, expended several thousand dollars and drilled three wells, the first of which was dry, but the other two of which were producing. Thereupon Zeigler and Howell made claim to the premises and filed this bill, as for waste, seeking a judicial declaration that their title and rights were paramount to those under the second lease. The District Court made a decree in accordance with the prayer of the bill, and the defendants below bring this appeal. The parties will be named as below, but "defendants" will refer to those other than Mrs. Hamilton.

A. J. Hopkins, of Chicago, Ill., and D. L. Pendleton, of Winchester, Ky., for appellants.

Le Wright Browning, of Maysville, Ky., for appellees.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge (after stating the facts as above). No question of record or of good faith purchase is involved, to any degree which makes it important. Before the defendants took their lease, they had actual notice of the existence of the former one. It

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fields below plow depth when requested to do so, and to pay for damage done growing crops while drilling.

"Fifth. No well shall be drilled nearer than 250 feet to any building on said premises without written consent of lessors.

"[6] Second party agrees to complete a well on the premises within one year from the date hereof (unavoidable accidents and delaying excepted), unless the lessee thereafter pays a rental of 10 cents per acre, payable quarterly in advance, until a well is completed, which payments for delay in completing well may be made direct to any one of the lessors or deposited to Emma Hamilton in the Lee County Deposit Bank, Beattyville, Ky., which payments shall fully and completely extend this lease from time to time until a well is completed, and lessors agree to accept said payments of rentals when made and to mail receipts for same to the lessee.

"[7] And it is further agreed that the lessee may at any time remove all his property and reconvey the premises hereby granted which conveyance said lessors agree to accept, and thereupon this agreement shall become null and void and the payments which shall have been made, be held by the lessors as the full stipulated damages for nonfulfillment of the foregoing contract. It is agreed that all the terms and conditions hereof shall extend and apply to the heirs, executors, administrators and assigns of the parties above mentioned.

"In witness whereof, the parties have hereunto set their hands and seals this the day and year first above written. Signed, sealed and delivered in the presence of

her
Emma X Hamilton. [Seal.]
mark

"Witness: W. V. Abney."

[The above numerals [6] and [7] are not in the contract; we insert them here for the purpose of identifying references to be made in the opinion.]

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was open to them, without unreasonable effort, to learn its full terms, and the case must be considered in the same light as if a copy of it had been before them when they took their interest. The main question is sharply one of law—whether the rights of plaintiffs had expired before defendants purchased. The answer to this question obviously depends upon the character of the first instrument. If it was a lease presently granting to the lessee a vested interest, accompanied only by covenants by the lessee as to what he would do in the future, and subject to be defeated only by some efficient future forfeiture, plaintiffs must prevail, because there never was any declared forfeiture. If it was an executory contract of lease upon condition subsequent, and not creating any vested interest until the condition had happened, defendants must prevail, because the rental which should have been paid March 2 was not paid until too late.

The court below considered with great care the question in which division this instrument belonged, and classified it as a grant which would continue during its prima facie term until forfeiture. This conclusion, and the cases cited in support of it, depend largely upon the affirmative granting language in the early part. We do not doubt its correctness, as applied to many situations in which this instrument would be involved; but we cannot escape the conclusion that this paper may belong in both classes, because, in some respects, it is fairly divisible and the different parts of it logically take different aspects. There is no reason why an executory and conditional contract for a lease may not be tacked onto the foot of a lease which is a present grant—an executed contract; and while we are clear that this is a grant for a year, conveying an interest which persists during the year, unless lost by abandonment, yet we think that the character of the lessee's interest after the expiration of the first year is not necessarily the same as his interest during that year, but must be ascertained and determined as a measurably independent question.

[1] Contracts of this general character are classified according to a nomenclature which calls them "or" leases or "unless" leases. "Or" leases would be exemplified by clause first in this lease, if it were complete in itself; "unless" leases are, or may be, such as are indicated by clause (6) of this lease. A covenant that the lessee will do one thing or will do another may impose a binding obligation, although in the alternative, and does not necessarily import any fatally optional or unilateral character. It is therefore held not inappropriate to a lease which grants a vested interest;[2] but a lease which does not take effect, or which does not continue to be in effect, unless the lessee does a certain act, is only executory, and is inoperative if the condition is not performed. Guffey v. Smith, 237 U. S. 101, 35 Sup. Ct. 526, 59 L. Ed. 856; Lindley v. Raydure (D. C. Ky.) 239 Fed. 928, affirmed 249 Fed. 675, 161 C. C. A. 585; Van Etten v. Kelly, 66 Ohio St. 605, 610; 64 N. E. 560; Glasgow v. Chartiers Co., 152 Pa. 48, 51, 25 Atl. 232; Shaffer v. Marks (D. C. Okl.) 241 Fed. 139, 151; note 44 L. R. A. (N.

[2] We recently had occasion to apply the same principle to a Kentucky contract involving a municipal franchise. Ashland Waterworks Co. v. City of Ashland, 251 Fed. 492, 163 C. C. A. 486.

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S.) 50. The execution of a second lease is, in such case, a sufficient avoidance of the first. Thornton's Oil & Gas (3d Ed.) §§ 192, 193.

[2] We are thus brought directly to the question, as the one immediately controlling, whether, considering both clause first and clause (6) any ambiguity results, and, if so, which shall be allowed to give character to the instrument. We think these clauses, set over against each other, do create an ambiguity. It is true enough that, if clause first is considered by itself and given full and complete interpretative effect, as if clause (6) were not present, we can say that there is nothing in clause (6) necessarily inconsistent with this effect, because we thereby, more or less unconsciously, assume that the first is dominant, and that any seeming inconsistencies in the other should be eliminated, if possible; but the converse is equally true. If we consider (6) by itself, and give to it its full natural scope, we can construe away any prima facie inconsistency found in the first. To determine whether there is ambiguity in the whole contract, these two clauses must be considered simultaneously, without first assuming that either one is entitled to dominance.

We cannot take the presence of the word "unless," in (6), as alone a sufficient indication of an "unless" lease. It modifies the immediately preceding provision that a well shall be completed within a year, and the vital question is whether this provision is a covenant or a condition; if the former, then the word indicates only a contingent extension of the time for performance; if the latter, then the rights of the lessee terminated at the end of the year, "unless," etc. The more important part of this clause is found in the later words, "which payments shall fully and completely extend this lease from time to time until the well is completed." These words distinctly imply that the lease would not be extended if the payments were not made, and hence tend to show an understanding and intent that, lacking payment, the rights under the lease would terminate at the end of the specified time. It is obvious that if the lease were not to be about to come to an end, there would be no occasion for doing anything to "extend" it.

The only reason suggested why these words do not justify this inference is that, when the parties said "extend this lease," they meant "extend the time for drilling." The reason for this interpretation is not compelling. Plaintiffs have insisted that, because the document used the language of a lease in its early part, it was a lease and not a license. There is no reason to doubt that the language of (6) was chosen as intelligently and carefully as the earlier language. Indeed, from an application of all the aids to interpretation hereafter mentioned, it seems highly probable that the parties chose their word correctly, and that they had in mind an extension, not of some provision of the lease, but of the lease itself, with everything appurtenant. We observe, also, that these payments had already been given function as the price of delay in drilling, and there was no occasion to say that they should extend the lease, unless it was intended that they should have a further and greater effect. The language is:

"Which payments for delay in completing well * * * shall fully and completely extend this lease."

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Concluding, therefore, as we do, that clause first by itself tends to show an absolute obligation to pay rent after the year if the well is not completed, and that clause (6) tends to show an optional right to pay rent quarterly in advance as a condition of getting the lease extended from the certain first year to the contingent further years, it must be considered which one imparts its own character to the lease. Upon this subject, we first observe that clause first is not complete in itself, but refers to clause (6). The alternative covenant, if it be rightly called a covenant, is not to pay rentals there stated, but to pay rentals "as hereinafter provided." If in truth the rentals provided for in (6) are conditional, and not obligatory, then there remains nothing obligatory about the rentals specified in clause first, because they are the same. They come into the first from their home in (6), and they bring their character with them.

Upon the same subject, we next observe that clause first is general; clause (6) particular. Everything said in the first is repeated and amplified in (6). The provision that a well shall be drilled within the year is repeated with slightly varying words, but the difference between "drill" and "complete" does not seem intended to be substantial. The provision in (6) covering a case of unavoidable delay or accident is an addition, but there could be no hesitation in giving it effect merely because it was not found in the first. The provisions as to time, manner, and amount of payment are amplifications of clause first, if that can be said of provisions which are by express reference present in the first. The provisions as to the effect of the payments to extend the lease declare the result of those same payments which are referred to in clause first.

These two facts—that the character of the rentals specified in the first can only be ascertained by reference to (6) and that (6), in particular and in detail, repeats and covers the subject mentioned more generally in the first—go far to persuade that the earlier must yield to the later in so far as there may be prima facie inconsistency; but other pertinent considerations tend in the same direction.

It is urged that the grant is not stated to be upon any conditions; the lessee's numbered covenants, 1 to 5, inclusive, being introduced by the denomination, "terms." The mere use or nonuse of the word "conditions" could not be very controlling; but on precise and careful application of language, whatever inference may be drawn therefrom is in favor of defendant's position. The last paragraph refers to "all the terms and conditions hereof." The numbered covenants which have been introduced by the word "terms" end with 5. If, indeed, these are terms in the strictest sense, so that they cannot be called conditions, then, when the last paragraph speaks of conditions, it must refer to something else, and thus it can only refer to (6) and (7).

Mrs. Hamilton could not read or write. The agent of the lessee prepared this lease, took it to her, explained it to her, and she signed it. Under the familiar rule, all doubts and ambiguities would be solved against the lessee. Leases of this character contemplate prompt development. No express provision for forfeiture in case nothing is done is included herein. A prompt and speedy right to have some one

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else explore and develop if the first lessee does not is vital to the lessor. In Kentucky, courts have worked out a rule by which, even where there is a full lease with covenants and no forfeiture clause, the lessor has a measure of protection through proceedings to forfeit, if, after notice, the lessee will not proceed with drilling (Monarch Co. v. Richardson, 124 Ky. 602, 99 S. W. 668; Warren Co. v. Gilliam, 182 Ky. 807 (207 S. W. 698); but this is an imperfect remedy involving delay and litigation, and only indirectly and by inclusion does it reach nonpayment of rentals. Its existence does not detract much from the very natural presumption that if a contract, which may be intended as an executed lease with covenants, or as an executory lease upon conditions, omits any clause of forfeiture, the omission was because it was thought not necessary, and that it was thought unnecessary because the lessee's rights were supposed to terminate at the end of the stated period unless the extension condition was performed. Certainly Mrs. Hamilton, if well advised, would not have intended to sign a lease where she had no way of terminating it for nonpayment except by litigating the question of reasonable notice, when she could just as well put the burden of continuing it upon the other side; and the same presumption ought to prevail when all her advice came from the other party. We should suppose that a due regard for the public policy of Kentucky, as evidenced by the Monarch and Warren Cases, requires that, when the year has expired and the lessee has done nothing, the future interest of the lessee should not be treated as vested unless the language of the lease imperatively so requires. See Chaurenet v. Pearson, 217 Pa. 464, 66 Atl. 855, 11 L. R. A. (N. S.) 417.

In addition to all this, it appears without dispute that when she signed the lease she was told by the lessee's agent that it was only for a year, and would be null and void at the end of that time if a well was not drilled, unless the renewal rent was paid in advance, and that no notice of any claim to the contrary came to her until after she had leased to the defendants. True, this agent read the lease to her; but he knew that she was an ignorant woman, wholly unfamiliar with such matters, and could neither read nor write, and that she would rely upon his explanation of what these strange and unfamiliar words meant rather than rely upon herself to understand as she heard him read them. With such a history of the transaction, to sustain the present contention of plaintiffs would be to permit the representations made to her to accomplish fraud and deceit. Surely, if the written words used are fairly capable of an interpretation by which, as the facts have now developed, they bring about the same result as if the representation had been true, the law should give them that construction, rather than one wholly subversive of the admitted intent.

This paper must be construed according to its peculiar and, we think, unique language. Upon the critical point, we get no satisfactory help from any of the cases cited; but as the result of all the considerations recited, we conclude that the promise to complete the well within the year should be treated as a condition, upon breach of which the rights of the lessees would terminate unless a future rental was paid as specified.

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The attempt to pay by mail was insufficient. The contract did not provide for such payment; to say the most, it only hints at it by its provision that a receipt for the payment shall be mailed; and there is no sufficient evidence of a general custom for such payment, of which Mrs. Hamilton had knowledge or should be presumed to have knowledge.

[3] The final position of plaintiffs is that since they endeavored to make payment promptly, and failed to do so only because of a mischance, equity should relieve them from the resulting hardship. We cannot regard plaintiffs' equities as so superior to those of defendants as to justify this result. Defendants purchased with knowledge of the former lease, but Mrs. Hamilton told them it had expired, they believed that it had, and we find that it had. Neither Mrs. Hamilton nor the other defendants knew that plaintiffs had made any attempt to pay. Apparently this attempt was first heard of, by her or by them, when this bill was filed. When the second lessees took their lease, their optional period was only three months; they actually intended to proceed promptly, and they did; within three months they had expended over $4,000 on the property and had developed it successfully. Plaintiffs, seemingly, never intended to do anything except to speculate. Neither they nor their assignors ever went upon the premises during the first year, or, so far as the record shows, went into the vicinity or engaged in any kind of exploration which would affect this property. While they notified defendants that they held the first lease and intended to enforce it, they did not give notice that they had made the required payment and thus kept it alive, nor did they otherwise make protest or claim, but stood by silently while defendants were expending their money improving the property.

The categorical testimony of plaintiff's agent that for nearly three months he did not know of this drilling and actual oil discovery being carried on by the defendants upon this and adjoining properties need not be doubted; but the claim that both of plaintiffs and those representing them neither knew nor were chargeable with knowledge of such important developments in a region where they were interested and about 10 miles from where they kept their principal office, is not very credible. True, they had a legal right to take a speculative lease, and reap if others sowed; but if they suffer legal disaster in their harvest, a court of equity will not be anxious to help them out. The prayer of Mrs. Hamilton that the first lease be set aside because of the fraud practiced on her by misrepresenting its purport (if its purport be as now claimed) is at least as appealing as plaintiffs' request to be saved from a loss of their profits.

We think that the legal title of defendants is superior, and their equities not less. It follows that they are entitled to a decree upon their cross-petition, and the decree below must be reversed, and the case be remanded for that purpose.

On Rehearing.

[4] Upon consideration of the petition of the appellee for rehearing, it appears that, after the submission of this case to this court and

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immediately before its decision, an opinion was announced by the Kentucky Court of Appeals in Ohio Valley Oil & Gas Co. v. Irvine Development Co. (May 2, 1919) 212 S. W. 110, which opinion is said to announce a rule inconsistent with the result reached by this court in this case, and that the Kentucky Court of Appeals has denied a rehearing in that case after our opinion in this case was brought to its attention. It further appears that the opinion of the Kentucky Court of Appeals may well be thought to rest essentially upon facts sufficient to distinguish that case from this, and that the rehearing may well have been denied, in whole or in part, for this reason.

It further appears that in any event at the time this controversy arose and this case was submitted to this court, there was no fixed and settled rule of law in Kentucky declared by its court of last resort and inconsistent with our opinion.

Thereupon the appellee's petition for rehearing in this cause is denied.

(259 Fed. 51)

SMITH v. CARUKIN.

In re HENDRICKSEN.

(Circuit Court of Appeals, Sixth Circuit. May 6, 1919.)

No. 3244.

1. SALES ⟹474(2)—CONDITIONAL SALES—VALIDITY AS AGAINST CREDITORS.

Although a chattel mortgage in Michigan is invalid as against certain creditors, unless recorded, a conditional contract of sale, which reserves title to the vendor, is valid at the suit of the vendor, even as against similar creditors.

2. BANKRUPTCY ⟹184(2)—CONDITIONAL SALE—APPLICATION OF RECORDING STATUTE.

In view of the contract, whereby petitioner had sold a motor truck to a bankrupt, which required petitioner's written consent to any resale that might be made by the bankrupt, Acts Mich. 1915, No. 64, providing that, where the property sold is intended for resale by the contract vendee, the instrument must be recorded like a chattel mortgage to protect the vendor, *held* not to apply to the case.

3. BANKRUPTCY ⟹184(2)—CONDITIONAL SALE—CHARACTER AS SUCH AND NOT AS MORTGAGE.

Contract for sale of motor truck to a bankrupt providing for payment in installments, and that title should remain in the seller as his equity appeared from time to time sufficient to secure him, etc., *held* not a passing of title with a reserved lien (that is, a chattel mortgage), so that the instrument required recording under the Michigan rule to protect the seller against the bankrupt's trustee.

4. BANKRUPTCY ⟹363—FILING OF CLAIM—RECLAMATION PETITION—ELECTION.

Conditional seller of motor truck to bankrupt, by filing general claim against the bankrupt for the purchase price named in the contract, the indebtedness being claimed only if the seller's petition to reclaim the motor truck failed, *held* not to have elected his remedy as against the general assets of the estate.

Appeal from the District Court of the United States for the Southern Division of the Western District of Michigan; Clarence W. Sessions, Judge.

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Petition by James W. Carukin against Edward L. Smith, trustee in bankruptcy of Julius F. Hendricksen, for reclamation of a motor truck. From an order granting the petition, the trustee appeals. Affirmed.

Albert R. Dilley, of Grand Rapids, Mich., for appellant.
Elvin Swarthout, of Grand Rapids, Mich., for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge. Carukin filed a petition with the referee in bankruptcy seeking reclamation of a motor truck which Carukin had owned and which he had turned over to the bankrupt, under a contract of sale which purported to reserve the title until the price was paid. The referee held that the attempted reservation of title was invalid; on petition to review, the District Judge reached the contrary conclusion and granted the petition, and the trustee appeals.

The written instrument involved is more or less informal. It is given in the margin.[1] Hendricksen, the bankrupt, was doing business under the name "Acme Service Co." The relations between the parties were somewhat close; Carukin depended upon the bankrupt to do what was right for the interest of both; and this document was written by the bankrupt and presented by him to Carukin, and by the latter signed without outside advice and apparently without close attention.

[1] A chattel mortgage, in Michigan, has long been invalid as against certain creditors, unless it was recorded; while a conditional contract of sale which reserved the title to the vendor has been held valid at the suit of the vendor, even as against similar creditors. The Michigan decisions on this subject are recited and discussed in our opinions in Mishawaka Co. v. Westveer, 191 Fed. 465, 112 C. C. A. 109; Deere Co. v. Mowry, 222 Fed. 1, 137 C. C. A. 539; Wood Co. v. Croll, 231 Fed. 679, 145 C. C. A. 565. Some further and more recent decisions of the Supreme Court of Michigan are hereafter noted.

These decisions may be summarized as drawing the distinction, regardless of the precise form or words of the contract which purports

[1] This is to witness that the Acme Service Company has received from James W. Carukin, one Stegeman two-ton motor truck (No. 1565) for which it agrees to pay seventeen hundred and seventy-five dollars ($1,775), as follows:

Five hundred dollars ($500) on July 5th and the remaining $1,275 in monthly payments of about one hundred dollars ($100) until fully paid. These monthly payments to begin about August 20th, 1917, and interest at the rate of six per cent. (6%) per annum to be computed and paid monthly.

Title to remain in James W. Carukin, as his equity appears from time to time, sufficient to secure him for amount unpaid at such times.

Acme Service Company to keep said truck insured against fire and covered by property damage insurance to secure said James W. Carukin.

Acme Service Company further agrees not to sell, transfer or assign this contract without the written consent of said James W. Carukin.

Dated at Grand Rapids, Mich., July 5th, 1917.

Acme Service Company,
Julius Hendricksen.
James W. Carukin.

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to reserve title, between one which passes title to the vendee and reserves or passes back a lien for the unpaid price and one which is truly executory as to the passing of title and declares conditions until the performance of which the title never passes. They all recognize the distinction just noted; but there has been difficulty—perhaps confusion—in the application of this distinction to the varying facts of many cases. Much of the difficulty which this court has experienced, and, we think the same may be said as to the decisions of the Michigan Supreme Court, has arisen because it was attempted to apply the form of a contract of sale with reservation of title to a transfer of ordinary merchandise to a merchant for the purpose of being resold by him and with the understanding that his vendee would get a good title. Each one of the above-cited decisions of this court and many of those in Michigan involve this situation and present this difficulty. Whatever was said in these cases by that court or by this was with reference to problems developed by this anomaly, and we are not inclined to extend unnecessarily their application to cases not involving that situation.

[2] A recent Michigan statute (Act 64 of 1915) has largely settled this particular difficulty by providing that in certain classes of sales (of which this may be one), where the property is intended for resale by the contract vendee, the instrument must be recorded like a chattel mortgage, and the name by which it should be called therefore becomes immaterial. If this statute applies to the present case, the result reached by the District Judge was wrong and the underlying question would need no attention. We therefore first consider the applicability of this statute. Was this motor truck intended for resale?

The statute does not, in so many words, limit itself to cases of resale by the vendee; but if it is clear that the only resale contemplated was to be one with the specific consent of the vendor—that is, one made jointly by the contract vendor and the contract vendee—the spirit and purpose of the statute would not be involved, and it should not be so construed to affect such a transaction.

Undoubtedly, both parties contemplated that this motor truck might be resold; that is admitted by Carukin; but, as we read the contract, it expressly provides that the resale can be made only with Carukin's written consent. Such a resale as was in contemplation would necessarily be of one of two classes: It might be for enough cash so that the bankrupt could simultaneously pay Carukin in full, and Carukin would have no further interest in the terms or conditions; or it might be on such terms that some or all of the unpaid purchase price would become a debt from the new purchaser to, or for the benefit of, Carukin. The express provision was that "this contract shall not be assigned" without Carukin's consent. The trustee claims that this contract provision relates to the second class just mentioned, but not to the first. To assume that it does not reach the first as well, is to beg the question. If, indeed, title is reserved in Carukin, then the bankrupt cannot pass title to any purchaser except by assignment of this very contract. No matter if the whole price were planned to be paid in cash, it is obvious that if anything obstructed the completion of the deal, the

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new purchaser would be entitled to the property only because he had become, however informally, the assignee of the bankrupt's interest under this contract. It follows that the requirement of Carukin's written consent reached any sale that might be made. We are therefore satisfied that the statute does not apply.

[3] Coming back to the underlying question: It is sought to classify the transaction as a passing of title and a reserved lien, because the title was to remain in Carukin "as his equity appears from time to time, sufficient to secure him for the amount unpaid at such times." It is said that this demonstrates the dominant thought to be to secure Carukin for his debt, thus constituting it really a mortgage. It clearly has a tendency in this direction; but the mere use of the words "equity" and "secure" cannot control. In the plainest and clearest case of a mere executory contract of sale with installment payments, the equitable interest of the vendor is only that he shall get his money, and it is natural to speak of this interest as "his equity"; and, in a very common and fair sense, the reservation of title is, in the same case, for the purpose of "securing" payment of the purchase price. On the other hand, this instrument lacks entirely these elements which are most essential as matter of form to make it a conveyance of title with a mortgage back or reserved lien. There are no words of conveyance; there was no bill of sale; there was no invoice or other customary incident of transferring title; and there were no promissory notes creating an apparently independent obligation to pay. If the clause reserving title in the vendor had been entirely omitted, the document would still have been, in form, a mere executory contract of purchase. Nor is any way provided for getting the benefit of the security and preserving the balance of the obligation—as would be appropriate to a mortgage. The paper seems to contemplate no remedy for the vendor, excepting that reclamation which, without mention, appertains by law to a reservation of title; and this tends to show that the title did not pass.

Upon the whole, when we come to classify the instrument as a conditional sale or as the reservation of a lien, we consider it ambiguous, and when we take into account the aggregate of the contract provisions and also all the conduct and relations of the parties which the record discloses, and observe the question in the light of the rule that ambiguities will be solved against that party who was relied upon to, and who did, select the language of the contract, we conclude that the judgment of the District Court was right, that the instrument was not of the class requiring record, and that Carukin's title is superior to the trustee's.[2]

[4] It is also urged that, because the petitioner has filed a general claim against the bankrupt for the purchase price named in this contract, reclamation should not be permitted. Of course, the filing of such a claim would sometimes be an election which would bind the petitioner; but here there was a careful disclaimer of any such re-

[2] See, and compare, Atkinson v. Japink, 186 Mich. 335, 152 N. W. 1079; Mishawaka Co. v. Stanton, 188 Mich. 237, 154 N. W. 48, L. R. A. 1917B, 651; Luce v. Stott, 201 Mich. 587, 167 N. W. 869; Young v. Phillips, 202 Mich. 480, 168 N. W. 549; Id., 203 Mich. 566, 169 N. W. 822.

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sult. The proof of claim, which named several different debts besides this one, was in this language:

"There is due affiant $1,125, and interest from July 5, 1917, the unpaid purchase price of another Stegeman truck, the title to which is in affiant. See his petition relative to it, filed with the referee herein, on January 24, 1918, on which affiant relies."

The proof of debt and reclamation petition must therefore be considered together, and the reasonable construction is that the indebtedness is claimed only in case the petition fails.

The order of the District Court is affirmed.

(259 Fed. 55)

SCHAMBS v. FIDELITY & CASUALTY CO. OF NEW YORK (two cases).

(Circuit Court of Appeals, Sixth Circuit. April 8, 1919.)

Nos. 3232, 3236.

1. COURTS ⟹342—FEDERAL COURTS—EQUITY JURISDICTION—WAIVER.

Where a surgeon became bankrupt when a judgment for malpractice was rendered against him, an action by the trustee in bankruptcy against a so-called liability insurer, which agreed to indemnify the surgeon for liability for malpractice, etc., must be considered to be one at law, though the parties proceeded on the assumption that it was one in equity, so an appeal from the judgment for insurer must be dismissed.

2. INSURANCE ⟹146(3)—LIABILITY INSURANCE—POLICY.

A policy of insurance should be construed favorably to the insured, and against the insurer, if the language leaves the matter in doubt.

3. INSURANCE ⟹514—LIABILITY INSURANCE—POLICY—CONSTRUCTION—"LOSS."

Where a policy insuring a surgeon against loss from liability for malpractice, and requiring the insurer to defend, etc., did not use language specifically showing that no action could be maintained thereon until the insured had suffered and paid a judgment, *held*, that the indemnity was not limited merely to sums paid by the surgeon; so, where the surgeon became a voluntary bankrupt after rendition of judgment for malpractice, such judgment constituted a loss within the terms of the policy, and the trustee in bankruptcy might sue for benefit of judgment creditor, who was the sole creditor scheduled.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Loss.]

Appeal from and in Error to the District Court of the United States for the Eastern Division of the Northern District of Ohio; D. C. Westenhaver, Judge.

Action by Wallace L. Schambs, trustee in bankruptcy of H. D. Fowler, against the Fidelity & Casualty Company of New York. There was a judgment for defendant, and plaintiff appeals and brings error. Appeal dismissed; judgment reversed, and cause remanded for new trial, on writ of error.

The bankrupt, Fowler, was a surgeon. He carried with the appellee (hereinafter called the company) a policy of so-called liability insurance, limited to $5,000. An action for malpractice was brought against him by one Rainsford. The company assumed the defense of the suit. Rainsford obtained judgment for $10,000. The company, with the consent of the assured, decided

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not to prosecute any proceeding for review. Thereupon Dr. Fowler filed a voluntary petition and was adjudged a bankrupt. He scheduled this judgment as his only debt, and showed assets of some $400. The trustee in bankruptcy, after providing for expenses, paid a 2 per cent. dividend upon this claim—the only one proved—and thereupon brought this action in the court below to recover from the company the $5,000 named in the policy. The company claimed it was liable only for what Dr. Fowler or his trustee had paid to Rainsford, viz. $200. The trial court took this view, and from a judgment accordingly the trustee prosecutes both error and appeal.

That portion of the policy which directly imposes liability reads as follows: "[The Company] does hereby agree: (1) To indemnify the * * * assured against loss from liability imposed by law upon the assured for damages on account of bodily injuries or death suffered by any person or persons in consequence of any malpractice, error or mistake of the assured. * * * (2) To defend, in the name and on behalf of the assured, any suit brought against the assured, etc."

Later clauses specifically provided (7) that the company would continue the defense of any such suit "until a final decision is rendered in the assured's favor, or until the case has been appealed to the highest court to which an appeal can be taken, or until the suit has been settled with the written consent of the assured," and (9) that the assured should not "voluntarily assume any liability nor incur any expense, * * * nor, except at his own cost, settle any claim, nor * * * interfere in any negotiations or legal proceedings conducted by the company on account of any claim."

Louis H. Winch, of Cleveland, Ohio, for appellant and plaintiff in error.

H. M. Roberts, of Cleveland, Ohio, for appellee and defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge (after stating the facts as above). [1] The petition by which the action was begun did not undertake to classify itself as a declaration at law or a bill in equity. It was docketed as if in equity, but asked no specific relief of any kind, excepting a money judgment. The answer did not deny jurisdiction in equity. The case was submitted to the District Judge upon an agreed statement of facts. We fail to see any color of right to proceed in equity, which would be sufficient to support equity jurisdiction, even in the presence of as much of a waiver as the parties can make (Toledo Co. v. Computing Co. [C. C. A. 6] 142 Fed. 919, 923, 74 C. C. A. 89), and we think the action must be considered to be at law. It follows that the appeal, No. 3232, must be dismissed, and the merits of the case will be considered under the error proceedings, No. 3236.

[2, 3] Upon the merits, the controlling question is this: Did the company indemnify against any part of the Rainsford judgment which Dr. Fowler or his estate had not paid? The question, in somewhat analogous cases, has been considered to be whether the indemnity was against liability or was only against ultimate loss, and there is supposed to be a sharp conflict of authority between the cases which classify such policies in one or the other category, although, when we come to consider the peculiar language of this policy, we do not find any embarrassing conflict.

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In policies of this nature, the distinction was early recognized between insurance against liability and indemnity against damages. Gilbert v. Wiman, 1 N. Y. 550, 49 Am. Dec. 359. In view of this distinction, it became common to insert in such policies the provision known as the "no action" clause, which provided that (e. g.):

"No action shall lie against the company as respects any loss under this policy, unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after a trial of the issue."

Under such "no action" policy, it was held, in Massachusetts, that the plain and express language of the policy must be given effect, and that the duty to indemnify did not arise until the judgment was paid. Connolly v. Bolster, 187 Mass. 266, 72 N. E. 981. The result in this Massachusetts case has been quite generally adopted in cases involving "no action" policies; and the presence of this clause has usually been given the controlling force which it seems to merit.[1] On the other hand, it was held in New Hampshire that such a policy would be construed as indemnifying against liability as soon as the liability was fixed by judgment. Sanders v. Frankfort Co., 72 N. H. 485, 57 Atl. 655, 101 Am. St. Rep. 688. This opinion has been followed in only one case involving the same kind of policy.[2]

The common intent of the parties must control, and there is, to say the least, serious difficulty in thinking that the parties intended that the duty to indemnify should arise before payment of the judgment, when they have, in express words, said that it shall not arise until after that event. However, this case does not require us to choose as between these conflicting views. This policy was drawn by the insurer; the company was presumably familiar with the common use and with the adjudged effect of this "no action" clause; and it omitted that clause from this policy. It chose rather to rely upon language which lacks that certainty and freedom from ambiguity which might have been had, and the language which it selected must be construed according to the usual rules for ascertaining its true intent.

The plaintiff contends that clause 2 and the later clauses, the substance of which has been stated, are inconsistent with clause 1, and so neutralize what might otherwise be thought the plain limitation of clause 1. We cannot find any substantial inconsistency. The phrase "loss from liability" necessarily contemplates the existence of two things: The precedent liability and the resulting loss. There can be

[1] Frye v. Bath Co., 97 Me. 241, 54 Atl. 395, 59 L. R. A. 444, 94 Am. St. Rep. 500; Carter v. Ætna Co., 76 Kan. 275, 91 Pac. 178, 11 L. R. A. (N. S.) 1155; Cushman v. Fuel Co., 122 Iowa, 656, 98 N. W. 509; Finley v. Casualty Co., 113 Tenn. 592, 602, 83 S. W. 2, 3 Ann. Cas. 962; Fidelity Co. v. Martin, 163 Ky. 12, 173 S. W. 307, L. R. A. 1917F, 924; Stenbom v. Brown Co., 137 Wis. 564, 119 N. W. 308, 20 L. R. A. (N. S.) 956; Allen v. Ætna Co. (C. C. A. 3), 145 Fed. 881, 76 C. C. A. 265, 7 L. R. A. (N. S.) 958.

[2] Patterson v. Adan, 119 Minn. 308, 315, 138 N. W. 281, 48 L. R. A. (N. S.) 184. The New Hampshire case is fully approved in the dissenting opinion in Fidelity Co. v. Martin, 163 Ky. 12, at page 31, 173 S. W. 307, L. R. A. 1917F, 924, and its principle seems to have ruled Davies v. Maryland Co., 89 Wash. 571, 154 Pac. 1116, 155 Pac. 1035, L. R. A. 1916D, 395, 398.

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no loss unless there is a liability. We may for the moment allow defendant its interpretation of the word "loss," and concede that it means only payment or collection, and still it would be entirely natural that the company should have the right to intervene and take entire control of the proceedings which fix liability, and have the right to defeat that liability if it could—even against the will of the assured. It would thereby only be protecting itself against that ultimate "loss" which it had insured. Nor can we think that the word "defend," in clause 2, rightly means "successfully defend." True, the covenant is to defend the suit, and judgment and execution are parts of a suit; but to say that an agreement to defend a suit carries a liability to pay the judgment that may be recovered would be an extension of the ordinary meaning of the word. If the plaintiff were at liberty to consider and rely upon clause 7 in this connection, it might argue that the meaning of the covenant to defend would be broader, and might be sufficient for its theory, because clause 7 agrees to continue the defense at least further than it was carried in this case; but Dr. Fowler expressly released the company from the performance of this clause. In so far as he represents Dr. Fowler, the trustee cannot deny the effect of this release; and since the failure to continue the defense further could not have prejudiced Rainsford, who was the only creditor, the trustee, as representing creditors, is equally without standing to complain.

However, the fact that the later clauses are not inconsistent with a limitation of the company's ultimate liability to that which is measured by the money paid by, or taken from, the assured, does not prevent these later clauses from serving to interpret clause 1. "Loss" is not a word of limited, hard and fast meaning. There are many kinds of loss, besides money out of pocket. No man would doubt that he might rightly call a "loss" that event which changed his status from solvency to insolvency, and compelled him either to go through bankruptcy or else be unable to own any property as long as he lived. Indeed, in the strictest sense of the word, the business man against whom a judgment of this kind became final during a fiscal year, so that at the end of that period he must carry it on his books as a liability, would, according to all familiar systems of bookkeeping, enter it as a loss for that period, and treat it accordingly; and he would seem to have a right to deduct it from his gross income under the permission of the income tax law to deduct "losses." It is clear to us that, as this word is used in clause 1, it is ambiguous, and may have attributed to it either of the meanings claimed by the respective parties here, according as the whole contract and the conceded circumstances may dictate.[3]

It is the familiar rule that ambiguities in such contracts are solved against the interest of the insurer. "A policy of insurance, prepared with much care for the interests of the insurer, should be construed favorably to the other party if the language employed leaves the matter in doubt." Casualty Co. v. Cumberland Co. (C. C. A. 6) 152 Fed. 961,

[3] "In the parlance of the business of insurance * * * the liability is called a loss." State v. Railway Co., 68 Ohio St. 9, 30, 67 N. E. 93, 96 (64 L. R. A. 405, 96 Am. St. Rep. 635).

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963, 82 C. C. A. 315, 12 L. R. A. (N. S.) 478. This thought has special force in a case where, as here, the insurer, in drafting the contract, discarded a form of contract which was in common use and which would have made the intent entirely clear according to its present claim, and used instead language which is capable of the construction claimed by plaintiff.

The inference which would naturally be drawn by the ordinary man is important to observe, in interpreting such a contract. The assured, in this class of contract, unless the contrary is clearly brought to his attention, must suppose that he is getting protection against the results of an adverse judgment. That he should carry what is called indemnity on account of damage suits, and find it of no help unless he first raised the money to pay the judgment, perhaps by stripping himself of all his property and at a sacrifice, would surely be a surprise to the ordinary policy holder; nor is it reasonable to suppose, unless it is made very plain, that he would deliberately take such a contract.

The solvency of all parties is the normal thing with reference to which contracts are made, and in interpreting the language used, we must suppose the assured was expected to discharge the obligations which the law might impose. If it is intended to provide for the abnormal situation where the assured refuses to perform his legal duty and because of insolvency the law cannot compel performance, language should be used which clearly reaches the unusual condition.

The peculiar results which would flow from adopting the company's construction may be considered. If the insured, against whom a personal injury judgment is rendered, has no property, he may decline to pay anything, thereby making the company's liability depend upon the assured's future acquisition of property so that something may be collected, or he may borrow from friends as much as he can, perhaps giving the insurance policy as security, and then whatever he pays on the judgment becomes a claim under the policy. If the judgment against the assured is $5,000, but only $3,000 can be and is collected from him on the judgment, he may collect from the insurance company $3,000, whereupon he will have further assets from which the balance of the judgment may be made; but he would apparently have no further recourse against the company, since the policy gives only one cause of action. Several such complications suggest themselves; and it is not likely that the parties intended to make a contract where liability would be dependent upon the whim of one party, or where it only partly covered the damage the whole of which it purported to reach. "A contract ought not to be construed to an absurd conclusion, if a reasonable one is possible." Casualty Co. v. Cumberland Co., supra, 152 Fed. at page 963, 82 C. C. A. at page 317, 12 L. R. A. (N. S.) 478.

Special difficulties to which the company's theory leads, in case of the insured's bankruptcy, are entitled to notice. Where, as here, there is only one creditor, the measure of damage is troublesome enough; but in the ordinary case there seems no satisfactory way of computation. Some of the difficulties were stated by the present Mr. Justice Pitney in Beacon Co. v. Travelers' Co., 61 N. J. Eq. 59, 64, 47 Atl. 579,

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and though the appellate court in that case (Travelers' Co. v. Moses, 63 N. J. Eq. 260, 49 Atl. 720, 92 Am. St. Rep. 663) undertakes to formulate a measure of damages, we are unable to apply that formula satisfactorily to the facts of this case, and it impresses us as somewhat arbitrary. The presumptions are against any intent by the parties to make a contract leading into such by-ways.

Evidently, their minds were largely centered upon the judgment which should fix the assured's liability, a considerable part of the contract is devoted to that subject and to disposing of the attendant conditions, and this distinctly tends to show what sort of a "loss" was in contemplation. When we give due weight to these portions of the contract and to each of the considerations which we have mentioned as bearing on the construction of the whole, we are satisfied that when the parties, in clause 1, referred to a "loss from liability," they intended that kind of a loss which, in ordinary nomenclature and thought, comes into existence when the liability of the assured becomes irretrievably fixed.

A careful review of all the cases cited from the various courts discloses not one, where the policy has indemnified against "loss from liability," has contained the obligation to assume and conduct the defense to a final judgment, and has not contained a "no action" clause, and yet where the company's liability has been limited to the assured's money out of pocket.[4] On the contrary, our conclusion as to the true meaning of such a policy finds direct support in Maryland Co. v. Peppard, 53 Okl. 515, 157 Pac. 106, L. R. A. 1916E, 597, and Blanton v. Kansas City Co., 103 Kan. 118, 172 Pac. 987, L. R. A. 1918E, 541. The numerous other cases cited as upholding the insurer's liability are all instances of clear and unquestionable indemnity against liability, rather than against loss.[5]

In No. 3236, the order will be that the judgment below be reversed, and the case remanded for a new trial in accordance with this opinion; in No. 3232, the appeal is dismissed.

[4] Lowe v. Fidelity Co., 170 N. C. 445, 87 S. E. 250, may be such a case, though the presence of the covenants to defend does not appear; and see Atlas Co. v. Georgia Co., 129 Tenn. 477, 483, 167 S. W. 109, so holding, but plainly obiter.

[5] American Co. v. Fordyce, 62 Ark. 562, 568, 36 S. W. 1051, 54 Am. St. Rep. 305; Fidelity Co. v. Fordyce, 64 Ark. 174, 41 S. W. 420; Fenton v. Fidelity Co., 36 Or. 283, 56 Pac. 1096, 48 L. R. A. 770; Lewinthan v. Travellers, 61 Misc. Rep. 621, 113 N. Y. Supp. 1031; Anoka Co. v. Fidelity Co., 63 Minn. 286, 292, 65 N. W. 353, 30 L. R. A. 689; Hoven v. Employers' Co., 93 Wis. 201, 207, 67 N. W. 46, 32 L. R. A. 388; Sheehan v. Farwell, 135 Mich. 196, 97 N. W. 728; Ross v. American Co., 56 N. J. Eq. 41, 38 Atl. 22; Fritchie v. Millers' Co., 197 Pa. St. 401, 47 Atl. 351; Pickett v. Fidelity Co., 60 S. C. 477, 38 S. E. 160, 629.

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(258 Fed. 607)

MAUPIN v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. April 3, 1919.)

No. 1681.

CRIMINAL LAW ⟹789(4)—INSTRUCTIONS—REASONABLE DOUBT.

An instruction in a criminal case on the subject of reasonable doubt and the presumption of innocence *held* correct.

In Error to the District Court of the United States for the Eastern District of South Carolina, at Charleston; Henry A. Middleton Smith, Judge.

Criminal prosecution by the United States against A. R. Maupin. Judgment of conviction, and defendant brings error. Affirmed.

G. T. Graham, of Lexington, S. C. (Timmerman, Graham & Callison, of Lexington, S. C., on the brief), for plaintiff in error.

J. Waties Waring, Asst. U. S. Atty., of Charleston, S. C. (Francis H. Weston, U. S. Atty., of Columbia, S. C., on the brief), for the United States.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. The plaintiff in error was convicted of illicit distilling in violation of sections 3258, 3279, and 3281 of the Revised Statutes (Comp. St. §§ 5994, 6019, 6021). The case is brought here on the narrowest technical ground. On the subject of reasonable doubt and the presumption of innocence, the following instruction was given to the jury:

"Where a defendant is placed on trial charged with an offense, the law presumes that he is innocent, and it devolves on the government to prove every material fact necessary to constitute the offense charged against him to the satisfaction of the jury beyond a reasonable doubt, and if the government has failed to do that then it is the duty of the jury to acquit the defendant."

This covers the subject fully, and it is of no consequence that the instruction was not in the language requested by counsel. Of course, there is nothing in the point that the charge should have been that it devolves on the government to prove every material ingredient necessary to constitute the offense instead of every material fact.

Affirmed.

(258 Fed. 607)

GUIGNARD v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. April 24, 1919.)

No. 1680.

1. INTERNAL REVENUE ⟹47—PROSECUTION FOR ILLICIT DISTILLING—SUFFICIENCY OF EVIDENCE.

Evidence *held* sufficient to support a conviction for illicit distilling.

2. CRIMINAL LAW ⟹778(2)—INSTRUCTIONS—BURDEN OF PROOF.

That an instruction charges that it devolves on the government to prove "every material fact" necessary to constitute the offense, instead of "every material ingredient," does not constitute error.

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In Error to the District Court of the United States for the Eastern District of South Carolina, at Charleston; Henry A. Middleton Smith, Judge.

Criminal prosecution by the United States against A. T. Guignard. Judgment of conviction, and defendant brings error. Affirmed.

G. T. Graham, of Lexington, S. C. (Timmerman, Graham & Callison, of Lexington, S. C., on the brief), for plaintiff in error.

J. Waties Waring, Asst. U. S. Atty., of Charleston, S. C. (Francis H. Weston, U. S. Atty., of Columbia, S. C., on the brief), for the United States.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. [1] Defendant was convicted on an indictment containing four counts charging him with being engaged in illicit distilling in violation of sections 3258, 3281, and 3279 of the Revised Statutes (Comp. St. §§ 5994, 6019, 6021).

The testimony against the defendant was, in substance, this: On March 20, 1918, the witnesses Fanning, Austin, and Coleman, federal and state officers, and one Whitworth, while driving along a community road in Lexington county in a northerly direction toward Columbia, saw two men come out of a swamp about 250 yards from the road they were on. The automobile was stopped, and Austin and Fanning pursued the two men, who had turned and run back into the swamp upon seeing them. By tracks and the noise he made in going through the thick undergrowth, Fanning was able to follow defendant across the swamp where he had stopped upon being hailed. Fanning identified him as the taller of the two men he had seen run from the opposite side of the swamp. Defendant was then brought back to the point from which he had run, and thence was taken some 50 yards along the creek or swamp to the still which he is charged with having in his possession and operating. At the still, two fermenters, some beer, caps, several jugs containing a small quantity of illicit whisky, a worm, and other distilling apparatus were found. The pots, or stills, were warm, and their supports too hot to handle. Defendant was placed under arrest and carried back to the automobile. A flask containing a small quantity of illicit whisky was found on him, and his clothes were soiled with soot and beer at the time of his arrest.

No exception was taken to the refusal to allow the introduction of the drawing or plat offered by defendant, and therefore the question of its admissibility is not before us.

It was not error on the part of the court to charge that:

> "This case is not, as has been said, a wholly circumstantial case. There are circumstances, but the mass of testimony is conflicting positive testimony."

The testimony as to the defendant's identity, his flight and capture was direct evidence.

Fanning testified that he found a half pint bottle containing "a little bit of whisky" in defendant's pocket at the time he was ar-

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rested. Coleman testified that the bottle admitted in evidence was not the same as that found upon the defendant, but that it contained the same whisky. The defendant himself admitted having a bottle in his pocket when arrested, but testified that he counted it empty. Since the material circumstance was not that the whisky was produced in court in the same bottle as that found upon defendant, but that defendant had illicit or blockade whisky upon his person at the time of his arrest, it was not error for the court to so charge.

[2] There is nothing in the point that the charge should have been that it devolves on the government to prove every material ingredient necessary to constitute the offense instead of every material fact. Maupin v. United States, decided April 3, 1919, 258 Fed. 607, 170 C. C. A. 61; Davis v. United States, 160 U. S. 469–493, 16 Sup. Ct. 353, 40 L. Ed. 499. In defining reasonable doubt the court said:

"Reasonable doubt is that which would control you in all important actions in your own affairs. It is frequently said a jury must find a man guilty without a doubt. You may find him guilty although you have some doubt, but you must not have any reasonable doubt."

Charges similar to this have been sustained by the Supreme Court and this court. Hopt v. Utah, 120 U. S. 430, 7 Sup. Ct. 614, 30 L. Ed. 708; Perkins v. United States, 228 Fed. 420, 142 C. C. A. 638; Hendrikson v. United States, 249 Fed. 34, 161 C. C. A. 94.

Affirmed.

(258 Fed. 609)

THE ELIZABETH MONROE SMITH.

(Circuit Court of Appeals, Fourth Circuit. April 28, 1919.)

No. 1710.

1. MARITIME LIENS ⟹65—REPAIRS—EVIDENCE.
   Evidence *held* to sustain a decree establishing a maritime lien for repairs under Act June 23, 1910, § 1 (Comp. St. § 7783).
2. INTEREST ⟹39(1)—MARITIME LIENS—REPAIRS.
   In a suit to establish a maritime lien for repairs, interest is properly allowed from the time the work was finished.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk; Edmund Waddill, Jr., Judge.

Suit in admiralty by the Norfolk Shipbuilding & Dry Dock Corporation against the steamer Elizabeth Monroe Smith; the Martinez-Butler Navigation Corporation being claimant. Decree for libelant, and claimant appeals. Affirmed.

Edward R. Baird, Jr., of Norfolk, Va. (Wesselman & Kraus, of New York City, on the brief), for appellant.

A. L. Roper and Henry Bowden, both of Norfolk, Va., for appellee.

Before PRITCHARD and WOODS, Circuit Judges, and ROSE, District Judge.

ROSE, District Judge. The appellee, the Norfolk Shipbuilding & Dry Dock Corporation, hereinafter called the repairman, on the 11th

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of May, 1918, libeled the steamer Elizabeth Monroe Smith for a repair bill of many items, all set forth in an annexed account and amounting in the aggregate to upwards of $13,600. The appellant, the Martinez-Butler Navigation Corporation, asserting that it was a body corporate of New York, and hereinafter called the owner, appears to have intervened as claimant and owner, and by furnishing a stipulation for the ship procured its release. The case came up for trial below on the 19th of December, more than seven months after the ship had been arrested. It was not until that day that the owner answered, or, so far as it appears, in any way disclosed its defense, and the answer then filed was to the last degree vague. It amounted to little more than a general denial of all the plaintiff's allegations and to a demand for proof of them. The only explanation it gave of why it knew nothing more on the subject was that at the time the repairs were made the ship was on a voyage from New York to South America, and that those in charge of the steamer, who, it was said, could not then be communicated with, were not authorized to contract for the expenditure upon the ship of anything like the sum for which the libel was filed. Who these persons were, or what was their relation to the ship or to its owner, was not disclosed. No explanation was vouchsafed as to how the ship could have been in a repair yard at Norfolk for six weeks without the owner knowing anything about it, if, indeed, the answer is to be understood as implying that the owner did not. It is but rarely that the admiralty sanctions an answer which tells in substance nothing more than would the plea of the general issue to a declaration at common law. In marine cases, whether for tort or contract, the witnesses are so likely to be widely scattered, the expense and difficulty of procuring their testimony is often so great, that the parties should be required by their pleadings to make a showing of the facts in their knowledge, so that the issues may be narrowed to the matters really in dispute.

[1] At the hearing before the learned judge below the owner offered no testimony, and relied there, as it does here, on what amounted to a demurrer to the evidence for the repairman. It asserts that it was not proved that the repairs were ordered by any one having authority so to do. It appears from the testimony of the shipbroker who negotiated the sale of her to the owner that he brought the ship from Philadelphia to the repairman at Norfolk for the purpose of having made to her the repairs recommended by the underwriters, and certain others which the owner itself wanted done, and one of the owner's representatives was on the ground directing the work. In the absence of any countervailing testimony, this was quite enough to entitle the repairman to the benefit of Act June 23, 1910, c. 373, 36 Stat. 604 (Comp. St. § 7783). The owner more seriously stresses what it claims were failures of the repairman to prove that the work and materials charged for were done or furnished. The record shows that various foremen in the employ of the repairman identified bundles of time sheets and requisitions signed by them, or by men under them, and that they had personal knowledge that such labor and materials went into the job. In its assignment of errors the owner asserts that

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for many of these items, aggregating more than $4,000, the time sheets or requisitions were not signed at all, or were signed by some people who were not produced as witnesses. It is conclusive to say that the assignment of error is not a part of the record, in such a sense that statements of alleged facts therein can be accepted as true, when the record discloses no other evidence of their truth. It should be added, however, that in this case it would not follow that, because the time sheets or requisition forms were not signed by a witness who was examined, the furnishing of the labor or material has not been sufficiently proved, for the testimony shows that witnesses examined said that they had personal knowledge as to the accuracy of statements appearing on the slips signed by their subordinates. When this testimony was offered, no objection was made to it, if it was open to objection. The prices charged are proved to be those then current in Norfolk.

[2] Interest was properly allowed from the date the work was finished. American Iron Co. v. Seaboard Air Line, 233 U. S. 261, 34 Sup. Ct. 502, 58 L. Ed. 949; Kinston Manufacturing Co. v. Freeman, 247 Fed. 54, 159 C. C. A. 272.

Affirmed.

(258 Fed. 611)

HARLAN v. HOUSTON (HUTCHISON, Intervener).

(Circuit Court of Appeals, Eighth Circuit. May 22, 1919.)

No. 5229.

1. COURTS ⟹312(5)—JURISDICTION OF FEDERAL COURTS—DIVERSITY OF CITIZENSHIP—"SUIT ON NOTE AND MORTGAGE."

   A suit to redeem from a foreclosure sale of land and for an accounting by defendant as mortgagee in possession is not one on the note and mortgage within Judicial Code, § 24 (Comp. St. § 991[1]), and where there is diversity of citizenship between the parties a federal court has jurisdiction, although the payee of the note was a citizen of the same state as complainant.

2. COURTS ⟹312(4)—JURISDICTION OF FEDERAL COURTS—CONSTRUCTION OF STATUTE.

   The change of language in Judicial Code, § 24 (Comp. St. § 991 [1]) from a suit "to recover the contents of any promissory note" as in Rev. St. § 629, to a suit "upon any promissory note" has not changed the law, and the old construction is still applicable.

3. COURTS ⟹365—FEDERAL COURTS—STATE DECISION AS LAW OF CASE.

   Where the highest court of a state has determined that a particular foreclosure sale was void and the purchaser a mortgagee in possession, such decision is the law of a subsequent case in a federal court involving the validity of the same sale.

4. INTEREST ⟹59(1)—PARTIAL PAYMENTS.

   The rule of the federal courts in case of partial payments is that interest shall be calculated whenever a payment is made, and the payment first applied to such interest, the balance, if any, to be applied on the principal; if the payment fall short of the interest due the balance of interest is not to be added to the principal so as to produce interest.

Appeal from the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

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Suit in equity by A. C. Houston against Richard D. Harlan, executor of the will of Phineas Prouty, deceased, J. G. Hutchison, intervener. Decree for complainant, and defendant appeals. Affirmed.

R. M. Hamer, of Emporia, Kan. (H. E. Ganse, of Emporia, Kan., on the brief), for appellant.

Gilbert H. Frith, of Emporia, Kan. (J. Harvey Frith, of Emporia, Kan., and A. L. Berger, of Kansas City, Kan., on the brief), for appellee Houston.

William T. Jamison and J. G. Hutchison, both of Kansas City, Mo., for appellee Hutchison.

Before HOOK and CARLAND, Circuit Judges, and AMIDON, District Judge.

HOOK, Circuit Judge. A. C. Houston, a citizen of Kansas, sued Richard D. Harlan, a citizen of Illinois and executor of the will of Phineas Prouty, deceased, for an accounting by the latter as a mortgagee in possession of a tract of land in Lyon county, Kan., and for the enforcement of a right of redemption. Plaintiff began the suit in a state court in Kansas, and defendant removed it to the court below upon the ground of diversity of citizenship. Defendant asserted title to the land through a suit in the state court to foreclose the mortgage commenced in 1894, completed in 1895, and resulting in a judgment, foreclosure sale, and a sheriff's deed in which he, the defendant, was grantee. With an exception that need not be detailed, the defendant has been in possession of the land under the sheriff's deed ever since 1896. J. G. Hutchison, who claimed an interest in the land, intervened and objected to the jurisdiction of the trial court. The trial court denied the objection of the intervener, held that the foreclosure sale and sheriff's deed to defendant were invalid, and awarded plaintiff the right of redemption with an accounting. The defendant appealed. The questions involved are of the court's jurisdiction, the plaintiff's right of redemption, and the terms of the accounting.

[1] The objection to the jurisdiction: The original payee from whom defendant's testator acquired the note and mortgage was a citizen of Kansas the same as plaintiff. The intervener therefore asserts that since the federal court could not have had original jurisdiction of a suit upon the note and mortgage had the original payee not assigned them, the suit at bar was not removable from the state court by defendant. Sections 24 and 28, Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1091–1094 [Comp. St. §§ 991, 1010]). The question finally is whether this is a suit upon the note and mortgage within the meaning of section 24. The answer must be found in the nature of the suit, and the relief sought by the plaintiff. The plaintiff is not here seeking to enforce the stipulations of the note and mortgage, but, on the contrary, is assailing their continued effectiveness. His main object is the clearance of his title to the land by annulling the foreclosure sale and sheriff's deed to defendant and accomplishing his right of redemption from defendant's mortgage lien. The suit is more like the common one to quiet title upon the doing of equity than one for the enforcement of a right of action founded on a contract containing

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within itself the contractual promise or obligation that is broken. A suit to redeem from a mortgage in the nature of a suit to quiet title has been held not within the statute. Power & Irrigation Co. v. Ditch Co., 141 C. C. A. 390, 226 Fed. 634. There is also an analogy to a suit to recover possession of a specific thing mortgaged, likewise held not within the limitation. See, generally, Corbin v. County of Black Hawk, 105 U. S. 659, 26 L. Ed. 1136; Deshler v. Dodge, 16 How. 622, 14 L. Ed. 1084; Bushnell v. Kennedy, 9 Wall. 387, 19 L. Ed. 736.

[2] The slight change in the statutory language from a suit "to recover the contents of any promissory note," etc., as it was formerly, to a suit "upon any promissory note," etc., as it is now in the Judicial Code, has not changed the law. Brown v. Fletcher, 235 U. S. 589, 35 Sup. Ct. 154, 59 L. Ed. 374. The old construction is still applicable. The intervener's objection was therefore rightly denied.

[3] The invalidity of the foreclosure sale and sheriff's deed to defendant because the order of sale was not authenticated by the seal of the court, and that defendant became a mortgagee in possession instead of owner, were settled for this controversy by Stouffer v. Harlan, 68 Kan. 135, 74 Pac. 610, 64 L. R. A. 320, 104 Am. Rep. 396. Stouffer was plaintiff's predecessor in title and his action was in ejectment. The court said: "The omission of the seal rendered the order of sale and all proceedings under it null and void." We must take the case at bar in that way, although if the question were open we would follow on principle as well as authority the later decision of the same court that the omission of the seal of a court is an irregularity cured as against collateral attack by confirmation of the sale. Carter v. Hyatt, 76 Kan. 304, 91 Pac. 61. Harlan defeated Stouffer's action in ejectment upon the expressed ground of a mortgagee in possession, and we cannot escape that conclusion as the law of the case. In the later case of Stouffer v. Harlan, 84 Kan. 307, 114 Pac. 385, defendant was still regarded as a mortgagee in possession.

[4] The record does not clearly disclose all the details of the accounting, but we think it went in accord with the following rules: In Kansas a mortgagee in or out of possession may pay taxes, if the owner does not, and have interest at 12 per cent. The rental value of the property is chargeable to a mortgagee in possession as payments upon the mortgage debt and his tax claims. As a general rule, the debtor has the right to direct the application of his payments; if he does not do so, the creditor may; if neither does so before a controversy has arisen, the court will apply them according to its notions of justice, exercising a sound discretion. Holly v. Missionary Society, 180 U. S. 284, 292, 21 Sup. Ct. 395, 45 L. Ed. 531; National Bank of the Commonwealth v. Mechanics National, 94 U. S. 437, 439, 24 L. Ed. 176. It is to the public interest that taxes upon which the government relies for its maintenance be promptly paid, and the inducement of the rate of interest to a mortgagee is in accord with that principle. An application by a court of payments first to tax claims and then to mortgage debt cannot be said to be contrary to a sound discretion. The making of periodical rests in which balances of accrued interest after partial payments are added to the principal for future

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computation is not favored in the courts of the United States. "The correct rule, in general, is, that the creditor shall calculate interest, whenever a payment is made. To this interest, the payment is first to be applied; and if it exceed the interest due, the balance is to be applied to diminish the principal. If the payment fall short of the interest, the balance of interest is not to be added to the principal so as to produce interest." Story v. Livingston, 13 Pet. 359, 370 (10 L. Ed. 200). See, also, United States v. McLemore, 4 How. 286, 288, 11 L. Ed. 977.

There are some other matters, including defenses of laches and limitation, but we do not think the court erred in regard to them.

The decree is affirmed.

(258 Fed. 614)

THE O'BRIEN BROTHERS.

(Circuit Court of Appeals, Second Circuit. May 14, 1919.)

No. 223.

1. COLLISION ⟹99—FAULT OF TUG—LOOKOUT.

A tug towing barges entering Hempstead Harbor was at fault for not maintaining a vigilant lookout to discover a drifting motorboat ahead, having no way on account of engine trouble; observers on bluffs several hundred feet from the scene of collision having been able to see all the vessels concerned with accuracy.

2. COLLISION ⟹11, 71(3), 99—FAULT OF VESSEL AND OWNER.

Where the owner of a motorboat, without crew, having engine trouble, and with an anchor insufficient to hold her, though his attention was called by a passenger to the obvious danger of an approaching tug and her tow, merely went to his engine to make repairs, where he could not see overboard, he and his boat were not without fault in collision with the tug's tow, there being no legal distinction in respect to rules of navigation between pleasure vessels, those operated for profit, large and small boats, or those numerously manned or operated by one man only, and the motorboat was also at fault for maintaining no lookout.

3. COLLISION ⟹144—CONTRIBUTORY NEGLIGENCE—HALF DAMAGES.

Where the personal negligence of the owner of a motorboat contributed to collision with a tug and her tow, he can recover against the tug only half his damages.

4. COLLISION ⟹144—CONCURRENT NEGLIGENCE OF VESSELS—RIGHTS OF PASSENGERS.

Third persons injured by the concurrent negligence of two vessels, on one of which they are passengers, are not affected in their rights by the negligence of their vessel.

5. DEATH ⟹99(4)—DAMAGES—AMOUNT—MARITIME ACCIDENT.

Awards of $5,000 and $6,000, under Code Civil Proc. N. Y. § 1902 et seq., for death of two childless married women, when a tug collided with a motorboat belonging to the husband of one of them, *held* not excessive though the husband suing as administrator was guilty of negligence contributing to the collision.

Appeal from the District Court of the United States for the Eastern District of New York.

In the matter of the libel and petition of O'Brien Brothers, Incorporated, as owner of the steam tug O'Brien Brothers her engines, etc., for limitation of liability. On exceptions to awards for damages

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caused by the death of two married women, the report of the Commissioners was affirmed (253 Fed. 855), and from the decree the petitioner appeals. Cause remanded, with directions to modify the decree as required.

See, also, 252 Fed. 185.

At dusk of July 28, 1906, with the weather fair, the tug O'Brien Bros. was entering Hempstead Harbor. She had a tow of three scows, two arranged tandem and put on the starboard side of the tug with the third outside the outer two, and also to starboard. This arrangement was chosen because the channel for vessels like the O'Brien Bros. is narrow and practicable only at high water, or nearly so. But the scows being light would float in water on the starboard side of the channel to which the tug was confined.

The foremost of the O'Brien's scows projected a considerable distance beyond the tug's bow, and a lookout was stationed at the forward end thereof. Running lights had been lit, but it was still so light that vessels in the harbor, even very small ones, were visible and easily watched from the bluffs which overlook and closely approach the shore of Hempstead Harbor.

As the tow was about to go through the narrow passage between Bar Beach and the other side of the harbor, the motorboat Zita, 30 feet long and drawing not over 2 feet, was starting from Bar Beach for Glen Cove, Long Island. She had barely gotten under way when her engine broke down. The only anchor she had was a sort of grapnel, weighing but 12 pounds, and, while efforts were being made to start up the engine, we find that the vessel drifted; for, though this small anchor was thrown out, it did not hold.

The crew of the Zita consisted of one man, her owner (Leyare), who (with his wife and four friends) was on board. As soon as the engine stopped, the owner devoted himself to the engine, which was under the deck of the boat. The Zita had no running lights, but there was a lantern hanging on the awning and a light, said to have been bright, in the galley. After the owner began to work on the engine, one of the passengers called his attention to the approaching tow, whereupon he said: "Let them come; there's lots of room." No further attention was paid to the tug and tow until collision was inevitable. The lookout on the tow did not see the motorboat, by his own testimony, until no more than about 30 feet separated the two vessels.

The Zita was caught under the rake of the head scow and turned over. The two women on board were drowned; the men suffered no serious injury, and swam to shore, which was less than a hundred feet distant.

The motorboat was somewhat injured, but, as the damages awarded show, not seriously.

Actions having been begun by the administrators of the deceased women against the owners of O'Brien Bros., this limitation proceeding was brought. The right to limit is not questioned here. The court below held the tug at fault in respect of navigation, exonerated the Zita, and awarded to one administrator $5,000 and interest and to the other $6,000 and interest. These amounts plus costs and small awards to the men including Leyare (for damage to Zita) do not quite exhaust the fund arising from the valuation of the O'Brien Bros., and her freight. The tug's owners appeal.

Foley & Martin, of New York City (George V. A. McCloskey and William J. Martin, both of New York City, of counsel), for appellant.

Edward B. Thomas, of Brooklyn, N. Y., for appellees.

Before WARD, HOUGH and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] We agree with the court below that the tug was at fault for not maintaining a vigilant and efficient lookout. It is plainly proven that observers on the bluffs, distant several hundred feet from the scene of disaster,

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saw all the vessels concerned and were able to state with accuracy the circumstances of collision.

Appellants urge in excuse that the shadows of the high shores of the harbor rendered it easier to perceive what was going on from the top of the bluff, than from the low deck of the advancing scow. Neither the evidence nor general knowledge justifies the distinction; but, giving all the weight that can be claimed for it, we are still of opinion that any competent lookout could and should have seen the Zita and perceived that she was nearly still, long before the vessels were only a boat's length apart.

[2] We cannot, however, agree that the Zita was without fault. She had an apology for an anchor, yet could hardly be called an anchored vessel; she was assuredly not under control; yet the crew of one man, after having his attention called by a passenger to an obvious danger, did nothing but betake himself to his engine, where he could not see overboard. He acted as if the very smallness of his boat, or some privilege inherent in pleasure craft, entitled him to cast all the burdens of avoiding collision on the other vessel. There is no legal distinction in respect of the rules of navigation between vessels operated for pleasure and for profit, between large boats and small ones, or those with a numerous crew and those operated by one man. The Zita also was at fault for maintaining no lookout, and neglecting all the precautions incumbent upon her whether regarded as anchored or not under control.

[3] This finding of fact requires modification of the decree appealed from so far as it covers the claim of Leyare individually against the owners of the O'Brien Bros. The personal negligence of Leyare contributed to this disaster, and he can recover but half his damages, and against him are awarded the costs of this appeal.

[4] The foregoing, however, does not affect the rights of third parties who were injured by the concurrent negligence of two vessels, upon one of which they were passengers. The Hamilton, 146 Fed. 724, 77 C. C. A. 150, affirmed 207 U. S. 398, 28 Sup. Ct. 133, 52 L. Ed. 264.

[5] As stated above, one of the passengers was Leyare's wife. She was drowned, and Leyare as her personal representative has been awarded $6,000. The administrator of the other woman passenger has received $5,000.

Appellants insist that the evidence furnishes no basis for awards of this size, or indeed for any substantial recovery. The claims rest on the statutes of New York creating a cause of action for death by wrongful act (Code Civ. Proc. § 1902 et seq.), and the amount of recovery is (in the absence of a jury) "such a sum as * * * the court * * * deems to be a fair and just compensation for the pecuniary injuries resulting from the decedent's death to the person or persons for whose benefit the action is brought."

Both the decedents were women of mature years, married, living with their husbands, and performing the usual duties of housekeepers of families in moderate circumstances. Both were childless, and their surviving husbands are apparently the sole beneficiaries of whatever

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recovery may be had herein. Under such circumstances, we think it so plain that the awards were reasonable in amount that no further discussion of the matter is necessary.

It is true that Leyare as administrator thus obtains a substantial recovery for the decease of his wife, to which his own personal negligence contributed. But as he sues in a representative capacity, it is the settled construction of the statutes above referred to that the individual negligence of one who claims in a representative capacity is not to be imputed even though the same person receives individually that for which he sues as representative. McKay v. Syracuse, etc., Co., 208 N. Y. 359, 101 N. E. 885; Braun v. Buffalo, etc., Co., 213 N. Y. 655, 107 N. E. 338.

The cause is remanded, with directions to modify the decree as hereinabove required. The claimants other than Leyare individually, who appeared by one counsel in this court, will recover one bill of costs on this appeal.

(258 Fed. 617)

EISENBERG et al. v. WEISSKOPF.

In re STERN.

(Circuit Court of Appeals, Seventh Circuit. April 29, 1919.)

No. 2602.

BANKRUPTCY ⟹288(1)—COURTS OF BANKRUPTCY—SUMMARY JURISDICTION.

Surrender to a trustee of property in possession of third persons claiming ownership thereof cannot be enforced by summary proceeding in the bankruptcy court, over objection of the claimants.

Petition to Review and Revise Proceedings of the District Court of the United States for the Eastern District of Wisconsin.

In the matter of one Stern, bankrupt. Petition by M. Eisenberg and S. Gorenstein against Ignatz Weisskopf, trustee, etc., to revise an order of the District Court. Reversed.

Michael Levin, of Milwaukee, Wis., for petitioners.

N. S. Robinson and Robert A. Hess, both of Milwaukee, Wis., for respondent.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

BAKER, Circuit Judge. Before the proceedings were instituted which resulted in the adjudication of Stern as a bankrupt, petitioners Eisenberg and Gorenstein were in possession of certain goods. After adjudication respondent Weisskopf, receiver and later trustee, filed a petition for a summary order on Eisenberg and Gorenstein to surrender the goods to the estate. At the summary hearing Stern testified that to evade the levy of an attachment he had put the goods into the possession of Eisenberg and Gorenstein as his agents or bailees to hold possession for him. On the other hand, Eisenberg and Gorenstein testified that the goods, originally theirs, had been put into Stern's retail store on consignment or conditional bills of sale; that under their reservation of title they had taken possession, in order to prevent their goods from coming into the possession of the attaching creditor; and

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that, prior to the filing of the petition in bankruptcy, they were in the physical possession of the goods under their aforesaid right to take and hold them as their own. And thereupon they insisted that they should not summarily be deprived of possession and that their title could only be adjudged in a plenary suit. The referee, although stating that he accepted Stern's testimony as true, found that the facts as sworn to by Eisenberg and Gorenstein would, if true, constitute an adverse claim, under which they could not be deprived of their possession of the goods except as the result of a plenary suit. The District Court reversed the order of the referee dismissing the summary proceeding.

On the authority of In re Goldstein, 216 Fed. 887, 133 C. C. A. 91, and cases there cited, the order of the District Court is

Reversed.

(258 Fed. 618)

JEONG QUEY HOW v. WHITE, Immigration Com'r.*

(Circuit Court of Appeals, Ninth Circuit. July 7, 1919.)

No. 3231.

HABEAS CORPUS ⟹25(1)—EXCLUSION OF ALIENS.

Where claim of right under Rev. St. § 1993 (Comp. St. § 3947), to enter the United States, made by appellant, a Chinese person alleging himself to be a citizen, was not first determined by a special board appointed under Act Feb. 20, 1907, appellant is entitled to a writ of habeas corpus, unless within a reasonable time proceedings are instituted against him in accordance with law.

Appeal from the District Court of the United States for the First Division of the Northern District of California; Maurice T. Dooling, Judge.

Petition by Jeong Quey How for a writ of habeas corpus against Edward White, as Commissioner of Immigration, Port of San Francisco. Writ denied, and petitioner appeals. Reversed and remanded, with instructions.

George A. McGowan, of San Francisco, Cal., for appellant.

Annette Abbott Adams, U. S. Atty., of San Francisco, Cal., Ben F. Geis, Asst. U. S. Atty., of Willows, Cal., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. Appeal is taken from the order of the court below denying the appellant's petition for a writ of habeas corpus. The appellant made application to enter the United States as a citizen thereof, claiming to be the foreign-born son of Jeong Sun, a native-born citizen of the United States, and thus entitled to enter the United States under section 1993 of the Revised Statutes (Comp. St. § 3947). The appellant was first caused to be examined under the general immigration law, and was found admissible. He was then caused to be examined under the Chinese Exclusion Act, whereupon his application to enter the United States was denied, for want of sufficient proof that he was the son of Jeong Sun, his alleged father.

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*Rehearing denied October 14, 1919

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The examination under the Chinese Exclusion Act was had before the immigration inspector. In Quan Hing Sun v. White, 254 Fed. 402, 165 C. C. A. 622, this court held that the claim of right to enter the United States, made by a Chinese person alleging himself to be a citizen of the United States, must first be determined by a special board of inquiry appointed by the Commission of Immigration, consisting of three members selected from the immigration officials under Act Feb. 20, 1907, c. 1134, 34 Stat. 898. This right was denied the appellant, and on the authority of that decision it follows that the judgment of the court below must be reversed, and the cause remanded for further proceedings.

The judgment is accordingly reversed, and the cause is remanded, with instructions to entertain the petition and grant the writ, unless within such time as the judge of the court below shall deem reasonable proceedings be instituted against the appellant under the provisions of the law as we have construed them.

(258 Fed. 619)

STEGER et al. v. ORTH.*

(Circuit Court of Appeals, Second Circuit. April 16, 1919.)

No. 73.

1. APPEAL AND ERROR ⟹107—RIGHT OF REVIEW—JUDGMENT ENTERED ON REPORT OF REFEREE.

   Where an action at law is by consent referred to a referee "to hear and determine" in accordance with the New York statute, it is the practice of the federal court to make an order for judgment on the referee's report; but such order is pro forma only, and the fact that the judgment is entered by the clerk without an order does not deprive the defeated party of the right to have the same reviewed on error.

2. SHIPPING ⟹39—CHARTERS—EXPIRATION—FAILURE TO LOAD WITHIN LAY DAYS.

   A charter does not terminate at the expiration of the lay days for loading because loading has not then begun; but where the agreement is to load at a certain rate and thereafter pay demurrage, the ship must wait thereafter for a reasonable time, the demurrage being the agreed compensation.

3. DAMAGES ⟹62(4)—BREACH OF CHARTER—MITIGATION OF DAMAGES.

   To get another cargo as good as can be obtained and as quickly as is reasonably possible is the extreme measure of a shipowner's obligation to mitigate damages on notice by the charterer that he will not load.

4. SHIPPING ⟹52—BREACH OF CHARTER—MITIGATION OF DAMAGES.

   Where a charterer refuses to load the cargo contracted for, the owner is under no obligation to accept a different cargo from him on different terms.

5. SHIPPING ⟹183—DEMURRAGE—INTEREST.

   Interest is allowable on demurrage based on charter party agreement, whatever the form of action.

In Error to the District Court of the United States for the Southern District of New York.

Action at law by Mountford S. Orth against Edward D. Steger and others. Judgment for plaintiff, and defendants bring error. Affirmed.

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*Certiorari denied 250 U. S. 663, 40 Sup. Ct. 11, 64 L. Ed. —.

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Addison S. Pratt, of New York City, for plaintiffs in error.
Alfred S. Barnard, of New York City, for defendant in error.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge. A motion to dismiss the writ or affirm the judgment must be disposed of before considering the merits. The substance of argument is that, owing to procedural defects, we are without power to do more than grant the motion.

[1] The action is at law, and as soon as issue was joined the case was referred to a referee "to hear and determine," by an order duly entered in the court below on the written consent of the parties. This method of trial needs no explanation to a practitioner under the New York Code of Civil Procedure. Plaintiff below (defendant in error) prevailed before the referee, upon whose report judgment was entered by the clerk in strict conformity with state practice.

It is now said that such a judgment is not reviewable in this or any other federal court, because the findings of fact and conclusions of law upon which the judgment rests were not adopted by the court below, nor did that court by any explicit order, made after the referee had submitted his report, direct the entry of the judgment complained of. For this doctrine it is sufficient to refer to Boogher v. New York, etc., Co., 103 U. S. 90, 26 L. Ed. 310.

It is true that the practice pursued in entering this judgment was erroneous, and it may be noted that the defendant in error presumably entered it; i. e., the same party who now moves to dismiss.

The question of adjusting trials before consent referees (common in many states of the Union), not only with R. S. § 914 (Comp. St. § 1537), and R. S. §§ 649 and 700 (Comp. St. §§ 1587, 1668), but also with the legislation creating and regulating the Circuit Courts of Appeal, is not new. The Fourth circuit, in Swift v. Jones, 145 Fed. 489, 76 C. C. A. 253, held that such method of trial was or ought to be unknown to the federal court; but in Tiernan v. Chicago Life, etc., Co., 214 Fed. 241, 131 C. C. A. 284, and Philadelphia, etc., Co. v. Fechheimer, 220 Fed. 408, 136 C. C. A. 25, Ann. Cas. 1917D, 64, the Eighth and Sixth circuits substantially held that, if the court approved or adopted the findings and conclusions of the referee, a judgment so obtained and entered was subject to review in the same manner as are judgments founded upon findings by the judge after trial of a common-law action with jury duly waived in writing.

This opinion and the practice resulting therefrom has long obtained in this circuit. The method of transforming the referee's findings into the action of the court and making the judgment recommended by the referee a judgment directed by the judge has not always been the same. Sometimes a motion for a new trial has been made; sometimes judgment has been applied for on the referee's report; sometimes two orders, one denying a new trial and the other directing judgment, have been entered.[1]

[1] See the remarks of the court in Parker v. Ogdensburgh, etc., Co., 79 Fed. 817, 25 C. C. A. 205; while the records in David Lupton's, etc., Co. v. Automobile Club, 225 U. S. 489, 32 Sup. Ct. 711, 56 L. Ed. 1177, Ann. Cas. 1914A, 699, and Homer Ramsdell Co. v. Compagnie Generale, 182 U. S. 406, 21 Sup. Ct. 831, 45 L. Ed. 1155, will exhibit the practice of this circuit and its variations.

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But this procedure is merely formal, and how thoroughly it is no more than a method of insuring to the party defeated before the referee that right of appeal which he never expected or intended to surrender appears in the opinion of Lacombe, J., in Kilduff v. Roebling's, etc., Co., 150 Fed. 240. That learned judge said:

"Although it is the practice here to make an order for judgment upon the report of the referee, instead of allowing the clerk to enter judgment without direction of the court, such order is pro forma only. The court will not undertake to modify or review the conclusions of law any more than it would the findings of fact. Indeed, the very object of a reference is to relieve the judge at circuit from considering or passing upon any of the questions which have to be determined in arriving at the final conclusion, which is to be embodied in the judgment."

What, therefore, should have been done was to procure a formal order, signed as of course, directing the clerk to enter the very judgment that was entered. But this mistake could have been corrected any time within the term of entry of judgment or any lawful extension thereof. The mistake was as much that of the defendant below as of the plaintiff, and we do not think that defendant in error can be heard to make the objection now.

In Newcomb v. Wood, 97 U. S. 581, 24 L. Ed. 1085, an action at law had been referred (in the United States Circuit Court) to several arbitrators pursuant to the practice of the state of Ohio.

"Two of the three referees only signed the award, but the attention of the court was not called to the fact when the report was confirmed, and judgment was entered. The omission was amendable, and non constat but that the amendment could and would have been made, if the objection had been suggested. It would be fair neither to the court nor to the other party to permit the objection to be raised here for the first time. Under the circumstances, it must be held to have been conclusively waived."

In that case it was the plaintiff in error who sought to insist upon the proposition that the judgment under review was a nullity; in this case it is the defendant in error who asserts what is practically the same thing. The distinction does not entail a difference, and for the reason above quoted we decline to entertain the motion to dismiss.

The record at bar contains no bill of exceptions, nor is any of the evidence even sought to be presented. Our duties, therefore, are limited to the inquiry as to whether the referee's findings of fact support his conclusions of law and the judgment following thereupon. Hudson River, etc., Co. v. Warner, 99 Fed. 187, 39 C. C. A. 452. This measure of investigation may be obtained without a bill of exceptions (Flagler v. Kidd, 78 Fed. 341, 24 C. C. A. 123); nor will it be necessary to advert to the pleadings, which (on both sides) were by formal order amended during the course of the trial "to conform to the proof," which proof or evidence is not before us.

It is not thought necessary even to mention most of the assignments of error, nor to consider all the propositions of the briefs, after consideration of which we think the material points are as follows:

Defendants below (hereinafter called Steger) had toward the close of April, 1915, a contract with the republic of France to deliver at one or more of sundry cities in France a large quantity of baled and pressed hay to be shipped from either Galveston or Texas City, Tex.

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Steger made a contract with a corporation to transport said hay, and plaintiff below (Orth) guaranteed the performance of said corporate contract, both as originally made and subsequently modified. Later Orth became the assignee of this corporate contractor, and he may for all purposes be spoken of as if he had originally made the agreements out of which this litigation arose.

Orth furnished ships to carry Steger's hay, but it was specifically found by the referee that he did not furnish any of the vessels in respect of which claims are advanced in this action under or pursuant to either the original contract above referred to or any other written agreement. On the contrary, by parol, the four steamships which ultimately carried a large portion of the hay were chartered to Steger, three of them on June 22, 1915, and the fourth, the Benwood, at some time prior to June 24th.

Steger's contract with the French government provided that the last of the hay should be shipped from America before July 20, 1915. On July 11, 1915, the Benwood and another steamer called the Aagot arrived at Galveston in the performance of Orth's parol charter arrangements with Steger.

The rate of loading was admittedly to be "700 tons per day." Whether this meant that number of tons per day for each steamer on the berth, or said number of tons to be divided among all the steamers that might be simultaneously loading, was a mooted question at the trial. As to which was the correct interpretation we express no opinion, for the referee adopted the latter contention, which was naturally that of Steger, and he cannot now complain of it. As matter of fact, the Aagot, which arrived about an hour ahead of the Benwood, was loaded first, and Steger made no attempt to put anything on the Benwood until after the Aagot's loading was complete.

The Aagot was loaded on July 30th, whereupon Orth refused to let her sail unless Steger instantly settled certain demands in respect of not only the Aagot, but the Benwood, and still another steamer. This contest was settled by agreement, but not until August 13th, when the Aagot sailed. In the meantime, and on August 7th, Steger notified Orth that no hay would be furnished for the Benwood. Subsequently the steamer provided herself with a cargo of staves, and defendants filled up the steamer with a comparatively small lot of hay. With this cargo she sailed for France in September, and her hay was delivered and received under Steger's contract with the French government. It is specifically found by the referee that—

> "It is not established by the evidence that it was impossible for [Steger] to supply a cargo of hay for the Benwood; * * * the utmost that can be inferred is that to have obtained hay in order to load the Benwood within a reasonable period after her arrival would have been expensive, and probably would have cost defendant in demurrage a large sum of money."

The large judgment now complained of, and rendered in favor of Orth and against Steger, consists (so far as it is necessary to specify) of (1) damages for breach of contract to load hay on the Benwood, and (2) demurrage on the Benwood and other steamers; demurrage being computed after lay days at the rate of one for 700 tons of cargo-carrying capacity.

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We notice the following alleged errors urged by Steger: (a) The charter of the Benwood was dependent on and collateral to Steger's contract with the French government. (b) The charter of the Benwood expired by limitation with the expiration of her lay days, calculated as above, viz. July 27th. (c) Orth's losses on the Benwood were due to his neglect of the duty imposed by law to mitigate damages by seeking other employment for his steamer. (d) Orth's conduct in refusing to let the Aagot sail, until his demands in respect of other steamers were satisfied, operated as a release of Steger from further liability in respect of the Benwood's charter. (e) Interest was not allowable upon the items constituting the principal of Orth's judgment below.

(a) It is argued under this head that because Steger had agreed to ship the last of his hay by July 20th, and by that date had put nothing on board the Benwood, he was therefore relieved of further dealings with that steamer.

This singular contention may be disposed of by pointing out that it is inconsistent with the admitted dealings between the parties hereto both before and after July 20th; as is said by the referee, the parties "apparently assumed, what appeared to be the fact, that the French government would not refuse to accept delivery of hay shipped after July 20th."

But such a contention as this can rarely rest merely upon a reading of certain papers, and when (as here) the agreement regarding the Benwood was in parol, it effectively disposes of the contention to point out that it has no finding of fact made by the referee upon which to rest.

It may be further noted that one of Steger's own requests to find was apparently intended to cover this point, and was refused by the referee. This fact is noted, to disapprove of the practice of burdening a record with such declined findings. When we have no power to do more than ascertain whether the judgment is supported by that which was found, we are not interested or concerned with what the referee did not find. Therefore such matters ought not to be inserted in the record.

[2] (b) It is reported as a fact that Steger did not, "in the negotiations which preceded the final termination of the [Benwood's] contract, take the ground that the contract was broken when the lay days expired; * * * up to August 6th [2] [Steger] claimed to control the Benwood, and had the right to load her with either hay or staves."

Under this finding of fact the contention now made is not open to plaintiff in error, but as matter of law it is wrong. It would indeed be a singular construction of so well-known a document as a charter party to hold that the charter necessarily terminates with the expiration of lay days. Doubtless an agreement may be made in such terms that, if no cargo is furnished before the expiration of lay days, the shipowner may cancel and seek other business. Where the agreement is to load at a certain rate and thereafter pay demurrage, demurrage

[2] (Note.—This date is an obvious clerical error for August 7th).

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is the agreed compensation for the use of the ship for a reasonable time after the expected period of her loading is completed. For such reasonable time the ship must wait. Wilson v. Thoresen's Linie, [1910] 2 K. B. 405. Cf. the discussion of the relation of charterers and consignee in Milburn v. Federal, etc., Co., 161 Fed. 717, 88 C. C. A. 577.

[3] (c) The duty of a plaintiff who has been injured by a defendant, whether through tort or violation of contract, to mitigate or minimize damages, is not doubted. But what are reasonable and proper efforts in respect of such mitigation present nearly always (and certainly in this case) a question of fact; and here plaintiffs in error are concluded by the findings below above cited, and the further finding that—

"There was no unreasonable delay on the part of [Orth] in securing a cargo for the Benwood after receiving [Steger's] notice that they would not supply hay for that vessel."

To get another cargo, as good a cargo as they could, and as quickly as was reasonably possible, was the extreme measure of the carrier's obligation to mitigate damages.

[4] It is specifically urged that Steger offered in substance to put on the Benwood a cargo which would not pay as large a freight as the hay, and then to make good the difference between such cargo and a hay cargo. It is admitted that on the hay cargo, as per contract, Steger was obliged to pay freight in advance; he refused to pay the equivalent freight in advance. This offer was made before August 7th. We entirely agree with the referee that such an offer (as matter of law) Orth was under no obligation to accept, whether it be called in mitigation of damages or substitution of occupation.

(d) Orth's conduct in respect to the Aagot's sailing was indefensible. The referee so found. Orth thereby subjected himself to some losses, which according to the findings below he must bear himself. But the charter of the Benwood was a separate and independent agreement. When Orth refused to let the Aagot sail, the Benwood was awaiting her turn to load, and we fail to discover in any fact reported to us any connection between what Orth did about the Aagot and damages for a proven, if not admitted, breach of the Benwood's charter on August 7, 1915.

[5] (e) However interesting may be the question of interest upon unliquidated damages, it is not open for discussion to these plaintiffs in error; it being specifically reported to us that interest was computed on items both of damages and demurrage by stipulation.

In respect of demurrage, even if there were no stipulation, interest should have been computed under our decision in Milburn v. 36,000 Boxes, 57 Fed. 236, 6 C. C. A. 317. That decision was in a cause promoted in admiralty, but the form of the action makes no difference. Interest is allowable upon demurrage based on charter party agreement.

Judgment affirmed, with costs.

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(258 Fed. 785)

DEER ISLAND LUMBER CO. et al. v. SAVANNAH TIMBER CO.

(Circuit Court of Appeals, Fourth Circuit. April 17, 1919.)

No. 1665.

MORTGAGES ⟹497(2)—FORECLOSURE—RIGHTS OF MORTGAGOR'S GRANTEE.

Where the grantee of mortgaged timber rights participated with the mortgagor in the foreclosure proceedings, and secured a postponement of the sale, it cannot avoid the binding effect of the foreclousre upon the ground that it was not made a party defendant.

Appeal from the District Court of the United States for the Eastern District of South Carolina, at Charleston; Henry A. Middleton Smith, Judge.

Bill by the Savannah Timber Company against the Deer Island Lumber Company and another. Decree for complainant, and defendants appeal. Affirmed.

A. C. De Pass and William N. Graydon, both of Columbia, S. C. (De Pass & De Pass, of Columbia, S. C., on the brief), for appellants.

B. A. Hagood, of Charleston, S. C., J. G. Padgett, of Walterboro, S. C., and Arthur R. Young, of Charleston, S. C. (Hagood, Rivers & Young, of Charleston, S. C., on the brief), for appellee.

Before PRITCHARD and KNAPP, Circuit Judges, and ROSE, District Judge.

ROSE, District Judge. The learned judge below so fully covered the facts that a further statement of them would be superfluous. It is unnecessary to follow the zealous counsel for the appellants in the discussion of numerous questions of law. It is sufficient to point out that the decree below is right beyond dispute, if the corporate appellant was a party to the foreclosure proceedings. The experienced trial judge, who saw and heard the witnesses, finds that such appellant, with full knowledge and for its benefit, assisted at the making of an agreement by which the foreclosure sale was postponed. The record fully sustains this conclusion.

Affirmed.

(258 Fed. 785)

CURCURU v. PENINSULAR ELECTRIC LIGHT CO.

(Circuit Court of Appeals, Sixth Circuit. June 30, 1919.)

No. 3198.

1. APPEAL AND ERROR ⟹237(2)—ADMISSION OF EVIDENCE—WAIVER OF ERROR.

In an action against an electric company for death of an employé of a contractor, who in the course of his work on building being constructed came in contact with a high tension wire and was killed, error in the tentative admission of evidence that the contractor had insured the lives of his employés, including deceased, and that a claim had been filed under the Michigan Workmen's Compensation Act and suspended, was waiv-

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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ed in appellate court, where there was no motion to strike such testimony and no instruction was requested that it be disregarded.

2. APPEAL AND ERROR ⟹1053(4)—REVIEW—HARMLESS ERROR.
In an action against an electric company for the death of an employé of a contractor, who in the course of building operations came in contact with a high tension wire and was killed, the tentative admission of testimony that contractor had insured the lives of his employés pursuant to the Michigan Workmen's Compensation Act was harmless, if erroneous, where the court charged that the fact that the contractor had insured the lives of its employés was not one on which finding could be based.

3. ELECTRICITY ⟹14(1)—HIGH TENSION WIRE—DUTY OF CONTRACTOR.
Where an electric company constructed a high tension line, which wires carried a deadly current of electricity, the deadly nature of such agency imposes on it duties of care.

4. TRIAL ⟹248—ACTIONS—ABSTRACT INSTRUCTIONS.
Where an employé of a contractor, in the course of constructing buildings near a high tension electric wire, met his death when he touched the wires with his hands, *hel* that, in an action against the company, a charge that the electric company was not bound to provide for absolute safety of one coming in contact with the wires, but was only bound to use reasonable care, depending on the circumstances, was not erroneous, though it gave the jury only an abstract rule.

In Error to the District Court of the United States for the Southern Division of the Eastern District of Michigan; John M. Killits and Arthur J. Tuttle, Judges.

Action by Gaetano Curcuru, administrator of the estate of Vincenzo Curcuru, deceased, against the Peninsular Electric Light Company, a Michigan corporation. There was a judgment for defendant, and plaintiff brings error. Affirmed.

Jos. T. Schiappacasse, of Detroit, Mich., for plaintiff in error.

James V. Oxtoby, of Detroit, Mich., for defendant in error.

Before KNAPPEN and DENISON, Circuit Judges, and WALTER EVANS, District Judge.

WALTER EVANS, District Judge. Vincenzo Curcuru, 25 years old, and a subject of the king of Italy, came to the United States and settled in Detroit, Mich., in 1912. At the time of his death he was employed by Jackson & Maurice Company, a firm which was constructing a two-story cement building on a lot on the northwest corner of North Grand boulevard and Hastings street in that city. While thus employed, on the 28th day of March, 1914, Curcuru was instantly killed upon coming in too close proximity to the electric wires of the defendant in error, and which wires, at least 10 years before that date, it had erected, and which it had ever since maintained and operated. The poles on which its wires were strung stood in an alley and in a line which ran near the walls of the building which Jackson & Maurice Company were constructing. On April 7, 1915, the plaintiff was duly qualified as administrator of the decedent's estate, and later instituted this action in the court below for the recovery of $25,000 for pecuniary losses and damages alleged to have resulted from the death of his intestate.

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The declaration contains two counts, but it is conceded that the second count has become of no further importance. The first count stated the basis of the plaintiff's claim to recover the compensation and damages sought. It averred that the defendant's poles supporting its wires were set in the ground on the north side of the alley, the alignment of the poles running east and west and up to where it crosses Hastings street; that for over five years prior to March 28, 1914, these poles supported ten wires attached to glass insulators attached to cross-arms at or near the tops of the poles; and that for over five years previously one of the poles was located on the northwest corner of the alley referred to and Hastings street. This alley was a public highway, and had been known as such for ten years previously. One of the defendant's poles was located on the north side of the public alley, about 100 feet west of the pole on Hastings street, and all of defendant's line of poles extended about 30 or 40 feet above the ground. Prior to March 28, 1914, and on that date there was a cross-arm supported by a brace and having attached to it five glass insulators supporting the wires, and prior to that date also another cross-arm was attached to said pole in a horizontal direction about 2 feet below the first cross-arm, which was supported by a brace attached to the pole, and attached to those cross-arms were five glass insulators supporting as many wires.

It is further averred that on March 28, 1914, it became and was necessary for the employés of the Jackson & Maurice Company to work in close proximity to the described poles and wires of the defendant, which, it was averred, was well known to the defendant. Plaintiff further averred that on and long prior to the 28th of March, 1914, the defendant was supplying electrical energy to divers persons, and that said electrical energy passed through the wires on the poles referred to, and which wires were known as high tension wires, and which electrical energy was of deadly potency, and that surrounding said high tension wires there was a deadly magnetic field.

The declaration then averred (probably quite as much matters of legal conclusion as of fact) that it then and there became and was the duty of the defendant, first, not to construct or place said high tension wires over or upon the property line of the lot where the employés of said Jackson & Maurice Company had to go in the performance of their duties; second, to construct and equip said high tension wires at such a distance from the property line of said lot that it would be impossible for the employés of that firm to be injured; third, to properly and safely insulate said high tension wires, so as to render impossible discharges of electrical energy at points where the employés of that firm had to go in the discharge of their duties; fourth, to properly and safely insulate said high tension wires, so that the employés referred to, in coming in contact with or getting in the magnetic field, would not receive an electrical shock; fifth, to properly and at reasonable intervals inspect said high tension wires; sixth, to construct and maintain said high tension wires at the point where the accident occurred, so as to render it safe for the employés of the firm referred to to perform their duties; seventh, not to use high tension wires for

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the transmission of its electrical energy in such a way as to render it dangerous to the employés of Jackson & Maurice Company in the discharge of their duties for that firm; and, eighth, to remove the pole located at the northwest corner of the intersection alley and Hastings street to a sufficient distance to prevent the wires on top of same from being unsafe for the employés of that firm.

Having alleged these to be the duties of the defendant, the plaintiff in his declaration further alleged that defendant had failed and neglected to perform any one of those duties, and this failure to perform those alleged duties is the negligence which is alleged to have brought about the death of the plaintiff's intestate, who, it is averred, while leveling the concrete on the top of the second story of the building, and performing the work incident to his employment, and while then exercising due care and without any fault on his part, came within the deadly magnetic field of the high tension wires of defendant, which had negligently and unlawfully been constructed and maintained over the top of said pole, and that the deceased did then and there receive an electrical shock from said wires of terrible potency, and was thereby electrocuted and killed, all on account of said electrical shock, and, having fallen to the floor of the second story of said building, was burned and lacerated in flesh, deadened in nerves, and death ensued.

Plaintiff averred that the death of said decedent was brought about by the negligent and unlawful conduct of the defendant in constructing, maintaining, and utilizing the high tension wires at a point dangerously near the place where plaintiff's intestate was compelled to go in the due performance of his duties. Plaintiff alleged that the decedent had left as heirs and next of kin his wife, 21 years of age, and his father and mother, each 65 years of age, and both of whom were dependent on decedent's intestate for support. It is claimed that the cause of action for negligence imputed to the defendant vested in the decedent's estate and in its administrator, and that the deceased contributed $25 monthly to the support of his wife and a like amount to each of his parents, and would have continued to do so during their expectancy of life. Plaintiff finally averred that by reason of these facts, and the injury thereby done, the right of action to recover therefor vested in the plaintiff's administrator, and he prays judgment for the sum of $25,000 as damages therefor.

The defendant demanded a trial of the matters set forth in the plaintiff's declaration, thereby putting in issue the truth of each and all of the averments therein made. Defendant also gave notice that it would give in evidence under the general issue, and would insist in its defense upon various matters, only two of which are necessary to be noticed, viz., first, that at the time of the injury the decedent was in the service of Jackson & Maurice Company, who were his employers, that his death resulted from a personal injury received by him on March 28, 1914, while in their service, and that the injury thus causing his death arose out of and in the course of that employment; and, second, that consequently, and upon other facts stated in the notice, the case came within the provisions of the act known as the

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Michigan Workmen's Compensation Law (Pub. Acts Mich. 1912 [Ex. Sess.] No. 10), one of the purposes of which is to restrict dependents of a deceased employé who has not exercised the option given him by said act, to the remedy and to the compensation provided for therein, with the right to the employer (in the present case, Jackson & Maurice Company) if the compensation be paid under said act, to enforce, for its benefit, any liability for insurance, but that plaintiff, as the administrator of the decedent's estate, had no right to recover, inasmuch as the only person entitled to do so was the widow of the deceased, and that, if she recovered compensation from Jackson & Maurice Company, the latter or defendant could look to the insurance company named in the notice.

As these defenses were developed and relied upon at the trial, they were to the effect: (1) That since the deceased had elected to remain under the protection of the act, his administrator had no right to elect to sue the defendant, the only remedy being for the widow to claim compensation from the employer under the act, and that the only liability of defendant would be liability over to the insurance company which had indemnified the employer; and (2) that, even if the deceased's representatives had the right to proceed against either the employer or the defendant, the option had been irrevocably exercised by instituting proceedings (afterwards discontinued) under the Workmen's Compensation Act. After reserving these questions until the end of the trial, the court then held that the proceedings initiated under the Compensation Act did not constitute an irrevocable election, and that the administrator could maintain an action under the Death Act. The issues of negligence and contributory negligence were submitted to the jury. The trial resulted in a verdict for the defendant, and the case was brought here.

The plaintiff, as grounds for reversal, insists upon three assignments of error—two of them relating to the admission of testimony, and the other to one phase of the charge to the jury. We shall deal with them in that order, though the two assignments (Nos. 2 and 3) relating to this subject will be considered together.

[1, 2] Upon these assignments it is insisted that the trial court erred in admitting testimony relative to the insurance which had been taken out by the Jackson & Maurice Company upon the lives of their employés, pursuant to the Compensation Act, whereby that act had become applicable and its restrictions took effect, and in admitting testimony that a claim had been filed under the Compensation Act, and then suspended. All of this testimony, however, was offered by the defendant (and apparently in good faith) pursuant to the notice of the defenses it would make and the testimony it would offer at the trial. Objection was made by the plaintiff to the admission of this testimony, and the court said:

> "We might proceed to other testimony, and come to this question afterwards. The testimony so far may stand, subject to a motion to strike out."

No motion of that character was made by the plaintiff. In this situation it seems to the court that, the testimony having been offered during the trial pursuant to the defendant's notice, it was at least tenta-

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tively admissible, though subject to be stricken out upon plaintiff's motion after the conclusion of all the testimony, and especially if it should then appear to the court that it ought not to affect the jury's verdict. No such motion having been made, it would not be fair, either to the trial court or to the defendant, to hold otherwise than that plaintiff by that failure waived his objections. Besides, we are satisfied that no prejudice could reasonably be supposed to have come to the plaintiff from the failure to exclude this testimony, especially as the charge made it clear enough to the jury that the fact that Jackson & Maurice Company had insured the lives of its employés was not one of the grounds upon which their finding could be based.

If plaintiff apprehended the possibility of prejudice in fact through the introduction of evidence showing a claim of the existence of another remedy, and the possibility that jurors would, for that reason, be less disposed to give plaintiff a verdict in the present suit, it was open to him to move to strike out the evidence, or to ask instruction that it be disregarded. But, in the absence of such motion or request for instruction, we think the court did not err in tentatively admitting the testimony, from the fact that it failed, on its own initiative, to either formally order the testimony stricken out or to expressly instruct the jury to disregard it.

[3, 4] The other assignment relates to that part of the charge to the jury wherein the learned trial judge said:

"It was not required of the defendant here to provide for the absolute safety of any one coming in contact with this wire, nor is it incumbent upon the defendant to exercise an extraordinary degree of care. Only is it incumbent upon the defendant to exercise reasonable care with reference to those wires. What reasonable care in any given case is depends peculiarly upon the circumstances that attend the particular case. Reasonable care will vary with the change of circumstances and the fluctuation of conditions surrounding the premises. * * * And what would be reasonable care in a building in process of construction might be considered to have been extraordinary and unusual care on the part of the defendant, had there been no building there. So, in every instance, when the jury is called upon to determine whether reasonable care is being exercised or not, it must look to the circumstances that are peculiar at the exact time under examination to the conditions then in operation. Now, reasonable diligence is what was required of the defendant, and that is to be determined by the jury, by considering all the circumstances which the jury feels should have reasonably come to the defendant's knowledge."

At the outset of any discussion of the questions raised by the assignment of error based upon this part of the court's charge, it may be well clearly to recall that this is not an action by the representative of a deceased employé against his employer. There were no direct relations between defendant—a lighting company—and the plaintiff's intestate, who was in the employment of a firm which, under a contract with other outside parties, was constructing a building upon a lot near to or over a small part of which ran at least one of defendant's wires. But the presence there of the defendant's wires imposed certain very important duties upon the defendant, whose business was conducted through one of the most dangerous agencies known in nature, and plaintiff in his declaration charged defendant with neglecting those duties.

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The testimony does not show that any one saw the deceased do the act which caused his death; but two, at least, of his fellow employés, who were at work near by, almost immediately afterwards saw what had occurred, and their testimony is in no way contradicted or called in question. One of them testified that when he "turned around he saw the deceased hanging on the wires," and the other testified that, "when he [the witness] turned around, he [the deceased] was hanging on the wire with both hands." Upon these uncontradicted and unqualified statements in the testimony, the inference almost inevitably must be that Curcuru's death was caused by his taking hold of a high tension wire with both hands, though whether deliberately or through some emergency is not clear. Whatever may have been the duties of the defendant in respect to those of its wires which ran near to or over a small section of the lot on which the cement building was being constructed by Jackson & Maurice Company, it could hardly be that defendant was under any duty to prevent the deceased from taking hold of its wires. It would seem to have obviously been the duty of any reasonably prudent man, even if he ventured near the wires, to abstain from putting his hands upon them when it might mean inevitable harm or even death itself.

The evidence tended to show that in November, 1913, defendant had in writing been notified by Jackson & Maurice Company that the building was soon to be erected, and its attention was therein called to the electrical situation on the lot, in view of the location of defendant's wires, and defendant was asked to make proper inspections and any necessary changes that might be required by the situation. The declaration shows that the wires were all insulated, and there is testimony tending to show that the defendant promptly attempted to meet the requirements of this notice, and supposed it had done so; but the testimony is undisputed that putting a hand on one of the defendant's insulated wires located near the building would almost inevitably bring instant death. The testimony also tended to show that plaintiff's intestate was a man of about 25 years of age, who had lived in Detroit 2 years, and that the witness who appeared to be nearest to him on the second floor of the building, where the deceased was working on March 28, 1914, did not notify him of the danger of touching the wires because the witness supposed the deceased knew it. It was no doubt assumed judicially and in every other way all through the trial that high tension electrified wires, though fully insulated (for waterproofing purposes), were and were generally known to be most dangerous and deadly when touched, and that every prudent person should avoid contact with them. This appears to be the situation the trial judge was called upon to meet in charging the jury.

The declaration having alleged and the testimony having shown that Vincenzo Curcuru was killed instantly, no cause of action therefor would have survived his death without the Michigan Death Act, which appears in the Compiled Laws of 1897 of that state as sections 10427 and 10428. This legislation provides a remedial proceeding in such conditions, and at the trial it was assumed that this law should control in this instance. No one now questions the propriety of that course. With this in mind, and stated generally, the question to be de-

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termined is whether the defendant's duty to the deceased employé of another then engaged in building the house was to use "extraordinary care," or "the utmost degree of care," or "the highest degree of care" (if there be any material difference between these phrases), to prevent injury to the deceased under the facts shown, or was the obligation of the defendant such as the trial judge defined it to be in the part of his charge we have set forth? Very many authorities have been cited upon the one side and the other of this question, but while we need not state in detail our analysis of them, upon careful consideration we have concluded that the rule laid down by the court below was the correct one upon the authority of cases like Burgess v. Stowe, 134 Mich. 204, 211, 96 N. W. 29, Warren v. City Electric Ry. Co., 141 Mich. 300, 301, 104 N. W. 613, and Crowe v. Michigan, etc., R. R., 142 Mich. 692, 695, 106 N. W. 395.

We do not intend to hold that the duty to use some higher degree of care did not exist; and while we think it would have been right to give the charge which plaintiff requested, we see no reversible error in giving, instead, the definition which the court adopted. It is beyond all doubt true that the ordinarily and reasonably prudent man will use greater and greater care as the dangerous character of the situation increases; hence an instruction that reasonable care is to be judged by the circumstances of the case, and that what would be reasonable under some circumstances would be more than necessary under other conditions, or less than necessary in still another situation, is not necessarily in conflict with the idea that a high degree of care should be required here. The illustration given was to the effect that the same care which would have been reasonable and sufficient, if there had been no building in process of erection, might be insufficient where building operations like this were being carried on. Instead of giving to the jury a specific interpretation of the rule which might have been helpful, the trial judge gave the general and abstract rule. If the wires were so highly dangerous as is claimed, a jury, under this charge, must have understood that it should take into account this highly dangerous character, in fixing the degree of care required; and we are not satisfied to regard the action of the court in this respect as prejudicial error. See discussion and citations in 9 R. C. L. pp. 1199, 1200.

It results that the judgment of the court below should be, and is, affirmed.

(258 Fed. 792)

YEE WON v. WHITE, Commissioner of Immigration.*

(Circuit Court of Appeals, Ninth Circuit. May 12, 1919.)

No. 3259.

1. ALIENS ⟹32(13)—CHINESE EXCLUSION—REVIEW BY COURTS.

Immigration officers have exclusive jurisdiction over Chinese exclusion cases, providing they give the applicant a fair hearing and do not abuse their discretion.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Rehearing denied October 14, 1919.

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2. ALIENS ⟹32(9)—CHINESE EXCLUSION—HEARING.

A Chinese exclusion hearing before immigration officers, which resulted in excluding a Chinese woman and her children upon ground that her husband had not satisfactorily established his status as a merchant, instead of a laundryman, *held* not to show abuse of discretion or denial of fair hearing.

Appeal from the District Court of the United States for the First Division of Northern District of California; Maurice T. Dooling, Judge.

Habeas corpus proceeding by Yee Won against Edward White, as Commissioner of Immigration at the Port of San Francisco. From a judgment sustaining a demurrer and denying the writ, petitioner appeals. Affirmed.

John L. McNab and Joseph P. Fallon, both of San Francisco, Cal., for appellant.

Annette Abbott Adams, U. S. Atty., of San Francisco, Cal., and Ben F. Geis, Asst. U. S. Atty., of Willow, Cal., for appellee.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

MORROW, Circuit Judge. The applicants, Chin Shee, Yee Tuk Oy, and Yee Yuk Hing, wife and minor children of the appellant, Yee Won, arrived at the port of San Francisco, Cal., on the steamship Tjisondari July 16, 1917. They applied for admission to the United States as the wife and minor children, respectively, of Yee Won, who, it is alleged, was a regularly domiciled Chinese merchant and a member of the exempt class. Admission was denied by the Commissioner of Immigration on the ground that the status of Yee Won as a merchant had not been satisfactorily established. On appeal to the Secretary of Labor, the excluding decision of the Commissioner of Immigration was sustained.

Yee Won thereupon filed a petition in the District Court for a writ of habeas corpus, alleging an unfair hearing by the immigration officials and abuse of the discretion committed to them by law. The United States demurred to the petition, and upon a hearing the court dismissed the petition. The case comes here on appeal, with the record of the proceedings before the Commissioner of Immigration submitted in support of such matters as are presented by the petition for the writ of habeas corpus and the demurrer to the petition.

[1, 2] It appears from this record that Yee Won first applied for admission into the United States at the port of San Francisco in April, 1901, as the minor son of a resident merchant. Yee Won was then 20 years of age. Admission was denied, and he was deported. He returned in November of the same year, and again applied for admission as the minor son of a resident merchant, and was admitted. The father of Yee Won died in San Francisco in 1908. In the latter part of 1910 Yee Won applied to the immigration officers at the port of San Francisco for an identification of his status. He was about to depart for China, and it was his purpose to secure such an identification as would secure his admission upon his return. He made no claim

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that he was a merchant. His claim was that he was "a capitalist and property owner." He was granted such a certificate and departed for China in January, 1911. He returned on May 29, 1914. He was then 33 years of age. He claims to have married Chin Shee in China March 2, 1911, and that a daughter Yee Tuk Oy, was born to them November 28, 1912, and a son, Yee Yuk Hing, was born to them on November 2, 1913. These three are the present applicants to enter the United States. They were all born in China, and this is their first application to enter the United States.

In support of the application of Yee Won to have his wife and minor children admitted to the United States, he testified that he was "a property owner and a capitalist," and in support of that claim exhibited to the immigration officers bank books, certificates of stock, and other documents showing that he was a person of means. He testified that he exported fruit from San Francisco to Tai Sang Fruit Company, at Sidney, New South Wales, in the years 1915, 1916, and 1917; that his firm in San Francisco was known as Tai Sang, a branch of the Australian house; that his place of business, which was also the place where he lived, was 842 Washington street, second floor, room No. 2; that his business in the years 1916 and 1917 amounted to $20,000. There is no evidence that there was any fruit goods or merchandise at this place. He testified that the packing and shipping was done elsewhere. In the list of property submitted by Yee Won is a lease dated September, 1910, for premises designated as No. 2426 Sacramento street, San Francisco, for the term of 20 years commencing the 1st day of October, 1910, at the rate of $25 per month during the first 5 years. Upon this and other testimony, the immigration inspector advised the Commissioner of Immigration that it was thought that the evidence offered was such as to justify the granting of the status of Yee Won as an exempt person—i. e., "a property holder and capitalist"—and that he had done no labor during the last year past.

While the case was thus pending upon this report before the Immigration Commissioner, an anonymous letter was received by the Commissioner, stating that Yee Won was not a merchant, but a laundryman at Sacramento and Fillmore streets. A further investigation of the case was immediately ordered. The place mentioned in the anonymous letter as Sacramento and Fillmore streets was found to be 2426 Sacramento street, which Yee Won had previously listed in his property schedule as having under lease. It was also found that this place had been a Chinese laundry for a number of years. The immigration officer proceeded to submit a photograph of Yee Won to a number of the patrons of the laundry, who identified him as the Chinese person who had driven a laundy wagon and delivered laundry from that place for a number of years. Yee Won was thereupon called for further examination, that he might be confronted by the persons who had identified his photograph as that of their laundryman. He failed to appear, and the Commissioner of Immigration thereupon decided that the exempt status of Yee Won had not been established to his satisfaction, and denied the admission of the applicant on that ground.

On appeal to the Secretary of Labor, the case was reopened to

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take further testimony as to the personal identification of Yee Won by the witnesses who had previously identified him by his photograph. Three of the witnesses were reported out of town, and their statements were not obtained. The statements of two other witnesses identifying Yee Won as their laundryman were obtained, but one of them was later not positive about the identification. Yee Ging, a cousin of Yee Won, was produced as the laundryman these witnesses had identified as Yee Won. The photographs of Yee Ging and Yee Won are in the record, and the resemblance appears to be so questionable and doubtful that certainly from their features there represented one would not be likely to be mistaken for the other. The result of this supplementary inquiry was submitted to the Assistant Secretary of Labor at Washington, and upon the whole case the Secretary of Labor sustained the exclusion decision of the Commissioner of Immigration at San Francisco, and thereupon the case was brought to the District Court upon a petition of Yee Won for a writ of habeas corpus.

In the decision of the District Court upon the demurrer to the petition, the court was of the opinion that the immigration authorities had found upon evidence that would warrant the finding that Yee Won had been engaged quite recently in driving a laundry wagon. This finding the court was of the opinion deprived him of the mercantile status to which he laid claim, but the court suggested the query whether, as Yee Won was "entitled to remain, his wife and children may not be admitted as the wife and children of one rightfully in this country who is entitled to the companionship of his wife and comfort of his children." In this court counsel for the appellant refers to this decision and says:

"It will thus be seen that the sole question is whether or not a Chinese person, entitled to remain in this country by virtue of our treaty with China, although held by the immigration officials to have lost his status as a merchant, is entitled to have his wife and minor children admitted."

By the treaty between the United States and China concluded in November, 1880 (22 Stat. 826), excluding certain Chinese laborers from coming to the United States, it was provided, among other things, that—

"The limitation of suspension shall be reasonable and shall apply only to Chinese who may go to the United States as laborers; other classes not being included in the limitation."

It is also provided that certain Chinese subjects, including "merchants," may "go and come of their own free will and accord." In section 2 of the act of November 3, 1893 (28 Stat. 7, c. 14 [Comp. St. § 4324]), Congress defined the terms "laborer" or "laborers" and "merchants" as follows:

"Sec. 2. The words 'laborer' or 'laborers,' wherever used in this act, or in the act to which this is an amendment, shall be construed to mean both skilled and unskilled manual laborers, including Chinese employed in mining, fishing, huckstering, peddling, laundrymen, or those engaged in taking, drying, or otherwise preserving shell or other fish for home consumption or exportation.

"The term 'merchant,' as employed herein and in the acts of which this is amendatory, shall have the following meaning and none other: A merchant is

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a person engaged in buying and selling merchandise, at a fixed place of business, which business is conducted in his name, and who during the time he claims to be engaged as a merchant, does not engage in the performance of any manual labor, except such as is necessary in the conduct of his business as such merchant."

In section 1 of the act of August 18, 1894, "making appropriations for sundry civil expenses for the government for the fiscal year ending June thirtieth, eighteen hundred and ninety-five, and for other purposes" (28 Stat. 372–390, c. 301), it was provided:

"In every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration or customs officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of the Treasury."

By the act of February 14, 1903, entitled "an act to establish the Department of Commerce and Labor" (32 Stat. 825, c. 552), the Commissioner General of Immigration, the Bureau of Immigration, and the Immigration Service were transferred from the Treasury Department to the Department of Commerce and Labor, and by the act of March 4, 1913 (37 Stat. 736–737, c. 141), to the Department of Labor. Under this last statute an appeal from the decision of the immigration officers excluding an alien from admission into the United States lies to the Secretary of Labor. This was the procedure followed in this case.

In United States v. Mrs. Gue Lim, 176 U. S. 459, 20 Sup. Ct. 415, 44 L. Ed. 544, it was held that the wives and minor children of Chinese merchants domiciled in this country might enter the United States without certificates. They come in by reason of their relationship to the husband and father, and whether they accompany him or follow him a certificate is not necessary in either case. That case was a deportation case, over which the judicial department of the government has exclusive jurisdiction. The present case is an exclusion case, over which the immigration officers have exclusive jurisdiction, providing that in the administration of the law they give the applicant a fair hearing and do not abuse their discretion.

The question submitted to the immigration officers was a question of fact. Was Yee Won a merchant? This fact had to be established to their satisfaction. In the case of In re Lee Lung, 102 Fed. 132, a writ of habeas corpus was issued by the District Court upon the petition of Lee Lung, a merchant in Portland, Or., on behalf of his wife and daughter, who had recently arrived at that port. His status as a merchant was not denied, but a landing was refused his wife and daughter by the collector of customs. The writ was dismissed; the court holding that it had no jurisdiction to review the action of the collector in such proceedings. The case was taken to the Supreme Court of the United States, where the judgment of the District Court was affirmed. Lee Lung v. Patterson, 186 U. S. 168–170, 22 Sup. Ct. 795, 797 (46 L. Ed. 1108). In the Supreme Court it was said:

"The testimony of several witnesses was introduced before the District Court against the objection of the district attorney. It showed that the petitioner was a merchant of Portland, Or.; that he had gone back to China and there married Li Tom Shi according to the Chinese customs and with

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the usual Chinese ceremonies, but that he had another wife with whom he lived when in China, and that Li A. Tsoi was the daughter by that wife. It was testified that a man in China could have as many wives as he had means to support."

The objection to the landing of Li Tom Shi appears to have been that the laws of the United States did not recognize plural marriages, and, while they might be so recognized in China, the said Li Tom Shi was not the valid wife of Lee Lung under our laws. The objection to the landing of Li A. Tsoi, the daughter of Lee Lung by his first wife, was that the evidence was conflicting and inconclusive, and not of the satisfactory character required. The court, referring to the decision of the District Court holding that it was without jurisdiction to review the decision of the collector of customs, said:

"It was decided in Nishimura Ekiu's Case [142 U. S. 651, 12 Sup. Ct. 336, 35 L. Ed. 1146] that Congress might intrust to an executive officer the final determination of the facts upon which an alien's right to land in the United States was made to depend, 'and that, if it did so, his order was due process of law, and no other tribunal, unless expressly authorized by law to do so, was at liberty to re-examine the evidence on which he acted, or to controvert its efficiency.' This doctrine was affirmed in Lem Moon Sing v. United States, 158 U. S. 538 [15 Sup. Ct. 967, 39 L. Ed. 1082], and at the present term in Fok Yung Yo v. United States, 185 U. S. 296 [22 Sup. Ct. 686, 46 L. Ed. 917], and Lee Gon Yung v. United States, 185 U. S. 306 [22 Sup. Ct. 690, 46 L. Ed. 921]."

In conclusion, the court said:

"But jurisdiction is given to the collector over the right of the alien to land, and necessarily jurisdiction is given to pass on the evidence presented to establish that right. He may determine the validity of the evidence, or receive testimony to controvert it, and we cannot assent to the proposition that an officer or tribunal, invested with jurisdiction of a matter, loses that jurisdiction by not giving sufficient weight to evidence, or by rejecting proper evidence, or by admitting that which is improper."

In Low Wah Suey v. Backus, 225 U. S. 460–468, 32 Sup. Ct. 734, 735 (56 L. Ed. 1165), the Supreme Court has again declared the conclusiveness of decisions of the executive officers of the government in this class of cases:

"A series of decisions in this court has settled that such hearings before executive officers may be made conclusive when fairly conducted. In order to successfully attack by judicial proceedings the conclusions and orders made upon such hearings, it must be shown that the proceedings were manifestly unfair, that the action of the executive officers was such as to prevent a fair investigation, or that there was a manifest abuse of the discretion committed to them by the statute. In other cases the order of the executive officers within the authority of the statute is final. United States v. Ju Toy, 198 U. S. 253 [25 Sup. Ct. 644, 49 L. Ed. 1040]; Chin Yow v. United States, 208 U. S. 8 [28 Sup. Ct. 201, 52 L. Ed. 369]; Tang Tun v. Edsell, 223 U. S. 673 [32 Sup. Ct. 359, 56 L. Ed. 606]."

The District Judge in the present case did not find that a fair hearing had been denied the petitioner, or that there had been any abuse of discretion on the part of the immigration officers in the proceedings, and we do not so find, after a careful inspection of the record. Chin Yow v. United States, 208 U. S. 8, 12, 28 Sup. Ct. 201, 52 L. Ed. 369.

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We conclude, therefore, that there was nothing in the case for the District Court to review, and that the judgment of the court dismissing the petition was correct.

The judgment of the District Court is accordingly affirmed.

(258 Fed. 798)

LOUIE SHARE GAN v. WHITE, Commissioner of Immigration.*

(Circuit Court of Appeals, Ninth Circuit. May 12, 1919.)

No. 3171.

1. ALIENS ⟹32(13)—CHINESE EXCLUSION—REVIEW BY COURT.
   Where a Chinaman was excluded after a fair hearing before the Commissioner of Immigration, and officers of that department did not abuse their discretion, the courts have no jurisdiction to review the proceedings.
2. ALIENS ⟹32(13)—CHINESE EXCLUSION—ABUSE OF DISCRETION.
   An order by Commissioner of Immigration, excluding a Chinaman on ground that his relationship to certain Chinamen in United States had not been established, is not subject to court review because partly based on difference in height between applicant and his alleged twin brother, where other discrepancies also indicated that evidence of relationship was unsatisfactory.
3. APPEAL AND ERROR ⟹181, 719(1)—RESERVING GROUNDS FOR REVIEW—NECESSITY.
   An objection not raised below, nor assigned as error on appeal, will not be considered.

Appeal from the District Court of the United States for the First Division of the Northern District of California; M. T. Dooling, Judge.

Habeas corpus proceeding by Louie Share Gan against Edward White, as Commissioner of Immigration at the Port of San Francisco. From an order denying a writ, the petitioner appeals. Affirmed.

Marshall B. Woodworth, of San Francisco, Cal., for appellant.

Annette Abbott Adams, U. S. Atty., of San Francisco, Cal., and Ben F. Geis, Asst. U. S. Atty., of Willow, Cal., for appellee.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

MORROW, Circuit Judge. The appellant, Louie Share Gan, represents himself as a native son of Louie Share Jung, a citizen of the United States; that he arrived in the United States at San Francisco, Cal., from China, during the month of May, 1917, and made application to the Commissioner of Immigration at the port of San Francisco for admission to the United States as a citizen thereof and a son of Louie Share Jung; that his application for admission was denied by the Commissioner of Immigration; that thereupon an appeal was taken to the Secretary of Labor, and the decision of the Commissioner of Immigration was sustained. Thereupon Louie Share Jung applied to the District Court for a writ of habeas corpus on behalf of Louie Share Gan, on the ground that the decision of the Commissioner of Immigration was unfair, and the Secretary of Labor and the officials acting under him were guilty of an abuse of discretion in

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⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Rehearing denied October 14, 1919.

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considering certain alleged discrepancies in the testimony of the applicant and an alleged twin brother, who was admitted to the United States in December, 1916, as the son of the petitioner and a citizen of the United States. A demurrer to the petition was interposed, which was overruled. Thereupon an amended petition was filed. A return was filed by the Commissioner of Immigration. To this return the appellant filed a traverse. After hearing by the court, the writ of habeas corpus was denied.

It is contended on behalf of the appellant that the hearing before the Commissioner of Immigration was manifestly unfair and unjust to the applicant, in that his relationship to his father and alleged twin brother was made to depend specially upon his lack of resemblance to his father and his twin brother, and because of a slight difference in height from his twin brother, standing both without shoes on the same level, indicating a difference in height.

[1] If the applicant had a fair hearing before the Commissioner of Immigration, and there was no abuse of discretion on the part of the officers of that department in the proceedings, the court had no jurisdiction to review the proceedings. Low Wah Suey v. Backus, 225 U. S. 460–468, 32 Sup. Ct. 734, 56 L. Ed. 1165. Yee Won v. White, 258 Fed. 792, 170 C. C. A. 86, just decided.

[2] The appellant contends that a judgment based on the difference in the height between the applicant and his alleged twin brother was—

"a gross abuse of discretion, and was unjust and unfair, and too notional, too fanciful, too irrational, and too uncertain to constitute any basis whatever for a ruling denying admission to the United States."

If this objection had merit, it would not avail the applicant in this case, since this is not the only ground the Commissioner of Immigration had for holding that the evidence as to the relationship between the applicant and Louie Share Jung was unsatisfactory. There are a number of discrepancies in the testimony sufficient to justify the Commissioner in declaring that the evidence was unsatisfactory.

[3] There is an addendum to appellant's brief in this court, claiming that the opinion of this court in the Case of Quan Hing Sun,[1] decided October 11, 1918, is controlling in this case. The objection to the proceedings in that case was not raised in this case in the court below and was not assigned as error in the appeal to this court. It was not mentioned until after the case had been submitted in this court. In the absence of a record presenting such an objection, it cannot be considered on appeal. Jeung Bock Hong and Jeung Bock Ning v. White, 258 Fed. 23, 169 C. C. A. 161, just decided.

The decision of the District Court is affirmed.

[1] 254 Fed. 402, 165 C. C. A. 622.

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(258 Fed. 800)

ASSOCIATED PIPE LINE CO. v. UNITED STATES.*

(Circuit Court of Appeals, Ninth Circuit. May 19, 1919.)

No. 3251.

1. INTERNAL REVENUE ⟹9—CORPORATION EXCISE TAX—"DOING BUSINESS FOR PROFIT."

A pipe line company organized by, and doing business only for, two other pipe line corporations, *held* not merely a convenient agent of these corporations, but to be doing business for profit within Corporation Tax Law.

2. INTERNAL REVENUE ⟹7—INCOME—CORPORATION TAX LAW—INTEREST DEDUCTION.

Under Corporation Tax Law of August 5, 1909, providing that interest paid on indebtedness not exceeding paid-up capital stock may be deducted in estimating net income, moneys paid a pipe line corporation by its stockholders *held* not payment for capital stock, but advances to corporation, and corporation, having no paid-up stock, could not deduct interest on such advances in calculating net income.

3. INTERNAL REVENUE ⟹28—CORPORATION TAX LAW—ADMISSIBILITY OF EVIDENCE.

A statement made by a corporation's auditor to an internal revenue tax agent that the corporation had no paid-up capital stock is admissible in proceedings to recover taxes under Corporation Tax Law of August 5, 1909.

In Error to the District Court of the United States for the Second Division of the Northern District of California; William C. Van Fleet, Judge.

Action by the United States against the Associated Pipe Line Company. Judgment for the United States, and defendant brings error. Affirmed.

Action by the United States against the Associated Pipe Line Company, a California corporation, to recover $1,423.56 for excise taxes for 1909, assessed under subsection 1 of section 38 of the Act of Congress of August 5, 1909, the Corporation Tax Law, 36 Stat. 111, 112, c. 6. The United States recovered judgment. Among other things the act provides: "That every corporation * * * organized for profit and having a capital stock represented by shares * * * and engaged in business * * * shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation * * * equivalent to one per centum upon the entire net income over and above $5,000 received by it from all sources during such year. * * * Such net income shall be ascertained by deducting from the gross amount of the income of such corporation * * * received within the year from all sources, * * * (third) interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the paid-up capital stock of such corporation * * * outstanding at the close of the year." The defendant below denied that it is a corporation organized for profit, and alleged that it never has and never could earn any profits; that it never had any net income and has no income; that its income never exceeded its expenses of maintenance and operation; that its income was derived solely from stockholders; and that the stockholders have always severally paid all excise and income taxes assessed against them respectively by the United States.

The facts found by the District Court and as agreed upon are, in substance, as follows: The Associated Oil Company was incorporated in 1901, and the Kern Trading & Oil Company was incorporated in 1903. The Associated Oil Company has always been a purchaser, producer, and seller of crude petroleum and its products, and the Kern Company has been an agent of the Southern Pacific Company, a railroad carrier, for the purpose of developing, handling, and furnishing to the Southern Pacific Company fuel oil for its locomo-

*Rehearing denied October 14, 1919.

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tive engines engaged in interstate and intrastate commerce. In 1907, these companies made an agreement containing the following matters: The Kern Company was then the owner of and operating a pipe line, together with pumping stations, tanks, and appurtenances, between Volcan and Delano, in California, about 31 miles; the pipe line being laid on the right of way of the Southern Pacific Company. The Associated Company and the Kern Company proposed to extend this pipe line from Delano to Port Costa along the right of way of the Southern Pacific Company between Delano and Goshen, and Fresno and Port Costa, and on the right of way of the Central Pacific Railway Company between Goshen and Fresno; the said line from Volcan to Delano and from Delano to Port Costa to be owned by a corporation in which the Associated Company and the Kern Company should be equally interested. It was agreed that a California corporation should be created to own, lease, and operate pipe lines, but not as a common carrier, for the transportation and movement of oil, etc., to be named Associated Pipe Line Company, with a capital of $7,000,000, or of 70,000 shares of $100 each. Directors were to be selected by each of the parties to the agreement. A president and superintendent were to be agreed upon. The Associated Pipe Line Company was to have vested in it, by purchase from the Kern Company at actual cost, the ownership of the pipe line, stations, tanks, and appurtenances between Volcan and Delano. The pipe line company was to construct and own the extension of the pipe line from Delano to Port Costa, together with stations and appurtenances, and might construct and own additional pipe lines that the parties desired jointly to build and operate.

It was agreed that the cost of the pipe lines, tanks, and appurtenances between Delano and Port Costa and all expenses of construction should be advanced by the Kern Company. The Associated Oil Company agreed that it would pay the Kern Company one-half of the entire total cost to it of the pipe lines, tanks, and appurtenances between Volcan and Port Costa within three years from the date of the agreement, and that on one-half of all the sums paid by the Kern Company, comprising such total cost, the Associated Oil Company would agree to pay interest. One-half of the entire capital stock of the Associated Pipe Line Company was to be issued to the Kern Company, and one-half to the Associated Oil Company. Expenses for repairing, operating, and maintaining were to be divided monthly between the Associated and Kern Companies in proportion to the amount of oil moved for either party to tidewater or intermediate points. Betterments and improvements, together with taxes and assessments upon the property of the Associated Pipe Line Company, were to be apportioned between the Associated Oil Company and the Kern Company. The pipe lines were to be exclusively used for the movement of oil belonging to the Associated and Kern Companies. They were so used, and the Associated Pipe Line Company has never been engaged in any business other than that of transporting oil through such pipe lines for the two above-named companies.

The Associated Pipe Line Company, plaintiff in error here, was incorporated in 1907, pursuant to the agreement just referred to, and the stock subscribed as follows: Calvin, 34,980 shares; W. F. Herrin, 10 shares; George L. King, 10 shares; W. S. Porter, 34,990; Buck, 10 shares. On August 27, 1907, the capital stock was issued to the nominees of Associated Oil Company and Kern Trading & Oil Company as subscribed for. In February, 1910, 34,980 out of the 34,990 shares issued to Porter were transferred to the Associated Oil Company, and on July 17, 1913, 34,970 of the 34,980 shares issued to Calvin were transferred to the Kern Company, while 20 shares remained with Calvin and Porter and their successors, as directors, and 30 shares remained in Herrin, King, and Buck, as directors, and the Kern Company and the Associated Company were the owners of the entire capital stock in equal proportions, except 50 shares held by the five directors; each director holding 10 shares. The purposes of the incorporation of the Associated Pipe Line Company were: "The acquisition, construction, owning, maintenance and operation, but not as a common carrier, of pipe line for transportation of oil within the state of California, together with necessary pumping stations therefor."

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Pursuant to the agreement of April, 1907, the pipe lines, tanks, and appurtenances between Volcan and Delano were conveyed to Associated Pipe Line Company after the organization thereof, and that company constructed an extension of the pipe line from Delano to Port Costa, together with stations and appurtenances, and also an additional pipe line from Maricopa to Port Costa. The Kern Company advanced the costs of construction between Delano and Port Costa and half the cost of the additional line from Maricopa to Port Costa, and the Associated Oil Company advanced the other half of the cost of the last-mentioned line.

Up to December 31, 1909, the Kern Company had advanced $4,978,401 for cost of the pipe line between Volcan and Delano and for cost of construction of extension lines from Delano to Port Costa; and on December 31, 1909, one-half of the sum so advanced by the Kern Company was owing to it by the Associated Oil Company, together with interest in the sum of $149,352. For convenience the account of such advances and interest was carried on the books of the Associated Pipe Line Company. The necessary expenses of maintenance and operation for 1909, inclusive of the sum of $149,325, was $674,232.23, which sum, together with $99,542.58 depreciation charged on the books of the Associated Pipe Line Company for 1909, made a total of $773,-774.81, which was charged by the Associated Pipe Line Company against the Kern Company and the Associated Oil Company for 1909, and was reported by the Associated Pipe Line Company to the United States as its gross income for 1909. The return made for that year also showed: "Total amount of paid-up capital stock at close of year, not adjusted." It showed no net income for 1909 and no tax payable by the Associated Pipe Line Company for 1909 under the act of August 5, 1909. The Commissioner of Internal Revenue disallowed the interest charge of $149,352, and, after deducting $5,-000 allowed by the provision of the act of Congress, assessed the Associated Pipe Line Company a special excise tax of 1 per cent. on the balance of $144,-352, amounting to $1,443.52, which the Associated Pipe Line Company paid under protest. Claim for refund was made in 1912 and was allowed on August 13, 1912, but in December, 1915, the commissioner concluded that he had erred in the refund for the reason that the Associated Pipe Line Company had no paid-up capital stock in 1909 on which to base a legal right for the deduction of interest, and after correction of the figures he demanded payment of $1,423.56. The Associated Pipe Line Company has never declared or paid any dividends on its stock, and the finding is that none of the capital stock of the Associated Pipe Line Company was paid until December 31, 1911.

Edmund Tauszky, of San Francisco, Cal., for plaintiff in error.

Annette Abbott Adams, U. S. Atty., and Frank M. Silva, Asst. U. S. Atty., both of San Francisco, Cal.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). The main points urged by plaintiff in error are: That the Associated Pipe Line Company is not a corporation organized for profit; that it is not carrying on or doing business within the meaning of the Corporation Tax Law; that the plaintiff in error had no net income during the year 1909 and was entitled to deduct from its gross income interest paid by it.

[1] We cannot uphold the argument that the agreement between the companies had the effect of making the Associated Pipe Line Company merely "the agent of Associated Oil Company and Kern Trading & Oil Company * * * as a convenient instrument for the construction, maintenance, and operation of pipe lines for the joint use of its owners," neither of which requires them for their entire length for the transportation of oil from oil fields. Corporate organi-

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zation was to acquire, own, maintain, and operate pipe lines to transport oil within California, and the activities of the corporation harmonized with the avowed purposes of its creation. It had a large business of transporting oil through pipe lines; it paid the Kern Company for a line that had been constructed from Volcan to Delano; it constructed and operated a pipe line from Delano to Port Costa, the payment for which work was advanced by the Kern Company as the moneys were required. The advances, amounting to nearly $5,000,000, were credited to the Kern Company as cash on the books of the Associated Pipe Line Company, although not against its stock subscription. Subsequently an entry was made as of December 31, 1911, transferring the advances on the books of the company to the capital stock account.

The plaintiff in error also constructed another pipe line from Maricopa to Port Costa, commenced in October, 1908, and operated the line in the early part of 1910. That advances made in connection with the construction of these pipe lines were made in equal proportion by the Kern and the Associated Oil Companies is not of special moment, beyond the fact that on advances made by the two companies the interest charge, over which this controversy has arisen, accrued. It seems that each company was allowed interest from the date it made its advances up to the time of the adjustment of the respective advances. It is explained that when the return of annual net income for 1909, showing $149,352 interest on open accounts, was made, this was interest accruing on the amount advanced by the Kern Company for the line which was then in operation, while for the advances which had been made by the Associated Oil Company no interest was allowed in 1909 and none charged until the line was in operation. However the pipe line company carried, on its books, accounts for the Associated Oil Company and the Kern Company in which they were credited with their cash advances as they were made from time to time, and no entry was made in the books with regard to payment for the capital stock of $7,000,000 until December 31, 1911, at which date both lines had been constructed.

The secretary and auditor of the Associated Pipe Line Company testified that the motive for making the interest charge of $149,352 was to equalize the investment in the pipe line, the two companies being entitled to 50 per cent. usage each, and he described the Associated Pipe Line Company books as only "a clearing account," and the entry as "a mere matter of adjustment between the two owning companies to equalize the use of the capital investment," and said that the present practice was for the companies to make adjustments between themselves, and that, if the Associated Oil Company had used the pipe line 55 per cent. and the Southern Pacific 45 per cent., then the Associated Oil Company paid to that company its percentage on the 5 per cent. that it had used its line.

The return made by the Associated Pipe Line Company was as by a corporation organized for profit, and the return showed that it had accumulated money. It is hard to conceive that the formation of the corporation was had with a view other than the realization of profit.

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It may be that the stockholders in the Associated Pipe Line Company took the profit away from the corporation, but it is clear that the way in which the money was made was by a corporate organization; and the corporation, having achieved the object of its creation, became subject to the imposition of the tax with respect to doing business. In Von Baumbach v. Sargent Land Co., 242 U. S. 503, 37 Sup. Ct. 201, 61 L. Ed. 460, a corporation was created "to unite in one ownership the undivided fractional interests of its various stockholders in lands," and to "own such property, and, for the convenience of its stockholders, to receive, and distribute to them," the proceeds of the disposition of such property at such times and in such amounts and in such a manner as determined by the board of directors. The Supreme Court found no difficulty in concluding that such a corporation was organized for profit and did not come within the exceptional character of charitable or eleemosynary corporations, and the court after examining the earlier corporation tax cases, held that the corporation was carrying on business and said:

> "The fair test to be derived from a consideration of all of them [the cases] is between a corporation which has reduced its activities to the owning and holding of property and the distribution of its avails and doing only the acts necessary to continue that status, and one which is still active and is maintaining its organization for the purpose of continued efforts in the pursuit of profit and gain, and such activities as are essential to those purposes."

The court emphasized the view that the Corporation Tax Law requires no particular amount of business in order to bring a company within its terms. The activities considered brought the corporation there in question within that line of the decisions which have held that such corporations were doing business in a corporate capacity within the meaning of the law. McCoach v. Mine Hill R. R. Co., 228 U. S. 295, 33 Sup. Ct. 419, 57 L. Ed. 842, illustrates the distinction. There a railroad corporation turned over its entire property under a lease to another company, and even ceased to exercise its power of eminent domain. It was held not to be engaged in business. The Associated Pipe Line Company appears to have been active, and to be maintaining its organization for the purposes for which it was created; it has expended and received money, has borrowed money, has constructed pipe lines, has allowed itself to be charged interest, has had dealings with its stock and stockholders concerning moneys received, and in 1909 was actually transporting oil and performing its corporate functions.

[2] We now inquire into net income during 1909. The company returned the total amount of paid-up capital stock outstanding at the close of year 1909 as "not adjusted," and the total amount of bonded or other indebtedness as "not adjusted," and the gross income as $773,774.81. It deducted the total amount of ordinary and necessary expenses, including interest charge, $674,232.23, and depreciation, $99,542.58; total deductions, $773,774.81; "net income nil." According to the findings, none of the capital stock of the corporation was paid until December 31, 1911. If we accept this finding as true, clearly the plaintiff in error in 1909 had no paid-up capital stock and was therefore

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not in a position to include the interest charge in arriving at what its net income was.

It is argued that, although the moneys were not entered in the capital stock account on the pipe line company books until December, 1911, the fact was there was no net income by way of interest on advances because such advances were not made by plaintiff in error and the interest was not earned by or payable to the pipe line company, and that the pipe line company was merely the conduit through which the Associated Oil Company paid the Kern Company the interest on the advances by the Kern Company. We gather the contention to be that the fact was that when the pipe line company was created the Kern Company transferred to it the then-existing pipe line from Volcan to Delano, and agreed to advance the cost of constructing the extension from Delano to Port Costa, and that this was the consideration for the issuance of the stock of the pipe line company to the Associated and the Kern Companies; that construction was commenced in 1907 and the line operated in 1908; that up to December 31, 1909, the advances for cost of the line from Volcan to Delano, and of the extension from Delano to Port Costa, amounted to about $5,000,000 upon which interest for 1909 was $149,352; and that stock of the par value of this amount had therefore been paid for up to December 31, 1909.

But this reasoning seems to lead to the conclusion that the advances that were made were in payment of capital stock, and, if such is the correct view, there was a sale of stock and no indebtedness.

The plainer view seems to be that there was an indebtedness on account of advances, but that there was no paid-up capital stock at the time of the return, and therefore that, as a matter of law, no interest could be deducted.

[3] An income tax agent in the Internal Revenue Department testified, over the objection of the plaintiff in error, that in 1915, when he investigated the books of the pipe line company, he had a conversation with the auditor of the plaintiff in error, and that the auditor then stated to him that the capital stock of the corporation had not been paid up to December 31, 1909, when the tax in question was assessed, and that the matter had not been adjusted. The objection was based upon the ground that any statement by the auditor, unless authorized by the corporation through its board of directors, would not be binding upon the company.

We think that the ruling of the court was correct. Lane v. Boston & Albany R. R., 112 Mass. 463; Lynchburg Tel. Co. v. Booker, 103 Va. 594, 50 S. E. 148.

The judgment is affirmed.

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(258 Fed. 806)

SAN PEDRO, L. A. & S. L. R. CO. v. BROWN.

(Circuit Court of Appeals, Ninth Circuit. May 19, 1919.)

No. 3172.

1. MASTER AND SERVANT ⟹289(35)—INJURY—DUTY OF CAR INSPECTOR.
Considering evidence of practice followed by inspectors, *held*, it could not be said, as matter of law, that it was incumbent on an inspector, working under a train and injured by the moving thereof, to make sure that his fellow inspector actually placed thereon the signal to indicate that it was being inspected.

2. MASTER AND SERVANT ⟹243(3)—INJURY—CONTRIBUTORY NEGLIGENCE—RULES AND CUSTOM.
While it is the duty of an employé to observe rules promulgated by the employer, yet, there being evidence of a custom with respect to the interpretation of a rule which does not clearly cover the particular situation which confronts the employé, the employé is not always negligent in following the custom.

3. NEGLIGENCE ⟹101—EMPLOYERS' LIABILITY ACT—COMPARATIVE NEGLIGENCE.
By express provision of federal Employers' Liability Act (Comp. St. §§ 8657–8665), contributory negligence of employé of interstate carrier merely mitigates damages, and does not bar recovery.

4. MASTER AND SERVANT ⟹180(4)—EMPLOYERS' LIABILITY ACT—NEGLIGENCE OF FELLOW SERVANT.
Federal Employers' Liability Act (Comp. St. §§ 8657–8665), making interstate carrier liable for injury to employé resulting from negligence of an officer, agent, or employé, renders it liable for negligence of fellow servant in prosecution of its business.

5. MASTER AND SERVANT ⟹180(5)—EMPLOYERS' LIABILITY ACT—NEGLIGENCE OF FELLOW SERVANT.
Though under rules of interstate carrier it is the duty of inspectors to put signal on train to indicate it is being inspected, one of two inspectors working together, by relying on the other to place such signal, does not make him his agent, with the result of absolving the carrier from liability under federal Employers' Liability Act (Comp. St. §§ 8657–8665) for his injury through negligent failure of the other to place the signal, but such negligence is attributable to the carrier; section 5 of the act declaring void, pro tanto, any contract or rule the purpose or intent of which is to enable the carrier to exempt itself from liability under the act.

6. MASTER AND SERVANT ⟹204(3)—EMPLOYERS' LIABILITY ACT—ASSUMPTION OF RISK.
A car inspector of an interstate carrier, who trusts to another inspector working with him to put on a train a signal indicating that it is being inspected, and goes on with his work unaware of the other's failure to do so, does not, under the federal Employers' Liability Act (Comp. St. §§ 8657–8665), assume the risk of such negligence of the other.

In Error to the District Court of the United States for the Southern Division of the Southern District of California; Oscar A. Trippet, Judge.

Action by Robert L. Brown against the San Pedro, Los Angeles & Salt Lake Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

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The San Pedro, Los Angeles & Salt Lake Railroad Company brought writ of error to review a judgment of the District Court in favor of Brown, defendant in error, upon a verdict for damages for personal injuries. The railroad company denied negligence and pleaded contributory negligence. The action was brought under the federal Employers' Liability Act April 22, 1908 (35 Stat. 65, c. 149 [Comp. St. §§ 8657–8665]), which provides, in substance, that every common carrier by railroad, while engaged in interstate commerce, is liable in damages to any person suffering injury while he is employed by such carrier in such commerce, whether such injury results in whole or in part from the negligence of any of the officers, agents, or employés of such carrier, and the fact that an employé may have been guilty of contributory negligence merely mitigates the damages and does not bar a recovery.

The evidence as produced by plaintiff below was as follows: Brown was an experienced car inspector employed by the railroad company at Otis, now Yermo, Cal. The inspectors worked in pairs; Brown's "partner" being one Ables, also an experienced inspector. On November 17, 1914, in daylight, they were about to inspect a train of 15 or more cars which was standing upon a main track west of the depot. The inspectors went toward the head of the engine, and separated near the head of the engine, Ables going on the south or engineer's side, and Brown on the north or fireman's side, of the engine. Ables had the blue flag in his hand. When the men separated, they were about 50 feet from the front of the engine, and Ables said, "I will put the flag there, and we will hold them there until we are through." Brown testified that it was not customary to put the flag right in the cab of the engine, but to place it on the running board, where the engineer could see it; that when he went around the engine on the north side he could not see the engineer or the fireman: that he passed two cars, and observed that on the third car, a "Salt Lake box car," the air was set, but the piston travel was too short; that he went to the west end of the car to adjust the brake, and crawled under the west end of the car behind the rear trucks, was facing forward, on the fireman's side, and pulled the release rod to release the brakes. The lever had a track spike in it, instead of a key bolt, and moved with difficulty, so he took his hammer from his pocket to strike, and was in the act of crawling up closer when he noticed the wheels starting. He made a "lunge," seized a grab-iron under the rear of the car, and managed to get out by the time the train came to a stop, but was injured. Brown said that he relied upon his partner to put the blue flag on the engine; that the custom was for one inspector to go on one side and one on the other, although they were supposed generally to go together.

There was evidence as to the custom of the railroad company with respect to inspection of air and of cars, and that when a train was brought into the yard the car inspectors place a blue flag on the end, and one inspector would go down each side of the train and inspect for brake shoes and brake "riggins." There was no evidence of a practice of putting a flag signal at each end of the train.

The testimony of Brown and Ables varies in some respects, particularly as to the conversation they had just before they separated; but Ables admitted that he was going toward the engine and had the flag in his hand. There was evidence that it was neither customary nor necessary that each inspector should personally see the flag on the engine before going beneath the car.

Certain rules of the company were introduced in evidence. One, No. 517, under the heading "Car Inspectors," reads: "When making repairs under cars standing on main track or side track, they must protect themselves by placing a blue signal on the drawhead or the platform or step of the car at each end of the train to prevent the cars from being coupled to or moved while they are making repairs." Rule 26, under which Brown said they were working, provides: "A blue flag by day and a blue light by night displayed at one or both ends of an engine, car, or train, indicates that workmen are under or about it. When thus protected, it must not be coupled to or moved. Workmen will display the signal, and the same workmen alone are authorized to move them. Other cars must not be placed on the same tracks, so as to intercept the signal, without first notifying the workmen." Another rule, No. 842, pro-

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vides, in substance, that if the brakes on the last car are properly set, inspectors or trainmen will signal to release the brakes, and the inspector will examine each car and see that the brake releases, and if any brakes will not release, or have leaks or broken rods, they must be cut out by closing the stop cock in branch pipe.

Fred E. Petit, Jr., A. S. Halsted, E. E. Bennett, and Dana T. Smith, all of Los Angeles, Cal., for plaintiff in error.

T. W. Duckworth, of San Bernardino, Cal., and J. H. Ryckman, of Los Angeles, Cal., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Judge (after stating the facts as above). [**1-3**] It is evident that the inspection was being made for defective brake equipment rather than an air test, and, considering the evidence of the practice followed by the inspectors at Yermo, we cannot say that, as a matter of law, it was incumbent upon the inspector who was working under the train to make sure that the other inspector actually placed the signal.

Certainly it is the right of an employer carrier to issue rules for the safety, guidance, and protection of its employés, and it is the duty of the employés to observe such rules. But, if there is evidence of a custom with respect to the interpretation of a rule which does not clearly cover the particular situation which confronts the employé, the employé is not always negligent in following the custom, and if in the observance of the usual practice he is injured through the negligence of his fellow employé, under the statute cited he may have a cause of action for injuries received. But, if we assume that Brown was negligent in not personally seeing that the flag was placed, surely his negligence was not the sole cause of the accident, for notwithstanding Brown's negligence, if Ables, his fellow inspector, had not negligently failed to place the flag, the accident would not have happened.

[**4, 5**] It is urged that no duty rested upon the railroad company to place a blue flag on any part of the train under which Brown was working, but that the duty to place such a flag was enjoined upon Brown, the inspector, that he could not delegate or confide the performance of such duty to Ables, and that, if failure to place the flag was the proximate cause of the injury, Brown could not recover.

In this connection we have carefully considered the argument of plaintiff in error that it could not have been the intent of Congress, as expressed in the act, to permit of recovery where an injury to an employé has resulted in any way from the negligence of a fellow servant. That may be so, and Reeve v. Northern Pacific Railway, 82 Wash. 268, 144 Pac. 63, L. R. A. 1915C, 37, sustains the argument. But that argument does not answer the question in the present case. The injury sued upon in the Reeve Case was received by the employé, who was a laborer about cars, by being pushed out of the car by another employé, who was scuffling with a third fellow employé, and brushed against the man who was thrown out. It was held that the injury was not caused by the negligence of a fellow employé, committed while he was prosecuting the business of the employer. Here, however, Brown

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was giving his undivided attention to his duty, the adjustment of a brake on a car, in order to put the brake in proper condition for the journey about to begin, and Ables had the flag and was also engaged in the business of the employer.

It is not open to argument that under the act cited the old defense of the fellow servant rule is gone, and we find no reasonable ground upon which to rest a conclusion that an interstate railroad employer can, by a rule made for the safety of the employés, destroy a cause of action in favor of an employé for injury received while performing a duty and directly caused by the negligence of a fellow employé.

The express declaration of the statute (section 5) that "any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability" created by the act, shall, to that extent, be void, gives aid in the proper interpretation of the act and is inconsistent with the theory advanced by plaintiff in error that Brown made Ables his agent to place the flag and that Ables' negligence is to be imputed to Brown, although Ables was a fellow car inspector. The two were fellow servants, and the act of the one in relying upon the other did not make a relationship of principal and agent whereby the employer can be absolved.

Considering the context of the statute, it is unimportant whether the negligence of the fellow servant, Ables, is called the negligence of the master or is called imputed negligence, for the liability of the carrier arises to any person suffering injury resulting in whole or in part from the negligence of any of the officers, agents, or employés of such carrier, and no "contract" or "rule" made for the purpose of attempting to establish a relationship between the employé and the carrier, to enable the carrier to exempt itself from the liability created by the act, can be sustained as effective in relieving the carrier.

[6] It is also argued that Brown must be held to have assumed the risk of the injury he sustained as a result of his reliance on his coemployé and the failure of his coemployé to place the flag and so protect him. The point is based upon a portion of the charge of the lower court to the effect that Brown did not assume the risks that were attendant upon the negligence of a fellow servant.

Clearly, under the act, the defense of assumption of risk is open to the carrier, except in actions brought under section 4, which provides that, in an action for damages for injury to an employé, "such employé shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employés contributed to the injury or death of such employé." Seaboard Air Line Ry. v. Horton, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475. But Brown was not injured by reason of any defect in the machinery, or by reason of any danger normally or necessarily incident to the occupation of inspecting cars. The accident would not have happened at all, but for the negligence of a fellow servant; and as to employers, while engaged in interstate commerce, the servant so engaged does not agree, as between himself and the carrier, to assume the risk of the neg-

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ligence of his fellow servant. Watson v. St. Louis R. Co. (C. C.) 169 Fed. 950. In Boldt v. Penn. Ry., 245 U. S. 441, 38 Sup. Ct. 139, 62 L. Ed. 385, the court affirmed the action of the trial court in refusing to charge that "the risk the employé now assumes, since the passage of the federal Employers' Liability Act, is the ordinary dangers incident to his employment, which does not now include the assumption of risk incident to the negligence of defendant's officers, agents, or employés." The opinion expressed was that the requested charge was erroneous, because the action there brought was not one within the provisions of section 4 of the act. But as far as we are advised it has never been held that in an action brought under the statute, where an employé trusts to another to do an act necessary for his safety, and he himself is not aware of the failure of such employé to do the act, and actually goes on with his work, relying upon the performance of the act by his fellow servant, and by reason of the negligence of the employé relied upon injury follows, the risk of such negligence on the part of the fellow servant is assumed by the injured man.

In Illinois Central Railroad Co. v. Skaggs, 240 U. S. 66, 36 Sup. Ct. 249, 60 L. Ed. 528, upon a writ of error to review a judgment recovered under the federal Employers' Liability Act, it was argued that the railroad company could not be negligent to an employé whose failure of duty and neglect produced the dangerous condition. The court took it for granted that under the statute recovery by an employé for the consequences of actions exclusively his own could not be had. In qualifying the assumption, the court said in effect that where the injury to the employé does not result in whole or in part from the negligence of any of the agents or employés of the employing carrier, or by reason of any defect or insufficiency, due to its negligence, in its property or equipment, action would not lie. "But," continued the court, "on the other hand, it cannot be said that there can be no recovery simply because the injured employé participated in the act which caused the injury. The inquiry must be whether there is neglect on the part of the employing carrier, and, if the injury to one employé resulted in whole or in part from the negligence of any of its other employés, it is liable under the express terms of the act; that is, the statute abolished the fellow-servant rule. If the injury was due to the neglect of a coemployé in the performance of his duty, that neglect must be attributed to the employer; and, if the injured employé was himself guilty of negligence contributing to the injury, the statute expressly provides that it shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employé." This decision we believe to be applicable to the facts in the case before us. Brown, pursuing the usual practice at Yermo, may have participated in the act of failing to put up the flag; but Ables' failure was, in large part, the direct cause of the damage. Brown relied upon Ables, and in reliance upon him went on to perform his duty. By the express terms of the statute the negligence of Ables may be attributed to the carrier.

We find no error in the record, and affirm the judgment.

Affirmed.

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(258 Fed. 811)

BUESSEL v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. April 16, 1919.)

No. 178.

1. CRIMINAL LAW ⟹1134(7)—REVIEW—APPELLATE PROCEDURE—USE OF WRONG REMEDY.

Act Sept. 6, 1916, § 4 (Comp. St. § 1649a), providing that no reviewing court shall dismiss an appeal solely because a writ of error should have been sued out, but that "when such mistake or error occurs it shall disregard the same and take the action which would be appropriate if the proper appellate procedure had been followed," does not authorize an appellate court, where a criminal case has been brought up by appeal, to exercise the same comprehensive powers of review which it is entitled to exercise when an appeal is rightfully taken, and review both the law and facts.

2. CRIMINAL LAW ⟹1090(1)—APPELLATE PROCEEDINGS—BILLS OF EXCEPTIONS.

A statute which authorizes a writ of error to be sued out thereby allows a bill of exceptions to be signed and used in connection therewith, for it is only through such bill that the rulings of the judge made at the trial become a part of the record to be reviewed.

3. CRIMINAL LAW ⟹1090(19)—APPELLATE PROCEEDINGS—RECORD.

Where there has been an actual trial, the parties are not at liberty to substitute a written stipulation or agreed statement of facts as to what occurred at the trial in lieu of the bill of exceptions required.

4. CRIMINAL LAW ⟹1090(8, 14)—APPELLATE PROCEEDINGS—RECORD.

The general rule has been that in actions at law evidence introduced or offered and rejected at the trial, and rulings thereon, can be brought before the appellate court only by bill of exceptions, and unless a statute otherwise provided such bill has been necessary to bring into the record for review the instructions and requests to charge; and such rules apply to criminal as well as to civil cases.

5. CRIMINAL LAW ⟹1091(10)—APPELLATE PROCEEDINGS—REVIEW.

The rule has been elementary, and applicable in criminal proceedings as well as in civil, that a ruling of the trial court upon the admission of evidence will not be reviewed in the appellate court, unless the bill of exceptions shows that an exception was taken thereto.

6. COURTS ⟹356—FEDERAL COURTS—CONFORMITY STATUTE.

The Conformity Statute (Comp. St. § 1537) has no application to bills of exceptions, or to the mode of reviewing a decision once made in a federal district court.

7. CRIMINAL LAW ⟹1090(2)—APPELLATE PROCEEDINGS—RECORD.

Judicial Code, § 269, as amended by Act Feb. 26, 1919, requiring appellate courts to "give judgment after an examination of the entire record before the court without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties," does not dispense with the necessity of a bill of exceptions to bring into the record matters which would not otherwise be a part thereof; but the record to which the act refers is that which is legally the record.

8. CRIMINAL LAW ⟹1090(5)—APPELLATE PROCEEDINGS—RECORD.

A demurrer to an indictment is a part of the record proper, and is not dependent on a bill of exceptions.

9. CRIMINAL LAW ⟹984—SENTENCE ON DIFFERENT COUNTS.

Unless a court, imposing sentence under each of several counts in an indictment, otherwise directs, the sentences under all run concurrently, and the fact that one count is defective does not entitle defendant to release from imprisonment.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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10. INDICTMENT AND INFORMATION ⟹203—VERDICT ON GOOD AND BAD COUNTS.
Where an indictment contains good and bad counts, a general verdict of guilty will be referred to the good counts, if sustained by the evidence, and the judgment will be affirmed.

11. COURTS ⟹356—APPEALS IN EQUITY—RECORD OF EVIDENCE.
Under equity rule 75b (198 Fed. xl, 115 C. C. A. xl), until the statement of the evidence in an equity case has been approved by the trial court or judge, it is not a part of the record for purposes of appeal.

12. CRIMINAL LAW ⟹1090(1)—"BILL OF EXCEPTIONS"—DEFINITION.
"A bill of exceptions" is a formal statement in writing of the exceptions duly taken at the trial to the decisions and instructions of the judge, with as much of the testimony as is necessary to enable the court to say whether error at law was committed in respect to the particular decisions or instructions as to which the exceptions were taken.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Bill of Exceptions.]

Ward, Circuit Judge, dissenting.

In Error to the District Court of the United States for the District of Connecticut.

Criminal prosecution by the United States against Theodore Buessel. Judgment of conviction, and defendant brings error. Affirmed.

Joseph P. Tuttle, of Hartford, Conn., for plaintiff in error.

John F. Crosby, U. S. Atty., and George H. Cohen, Sp. Asst. U. S. Atty., both of Hartford, Conn.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

ROGERS, Circuit Judge. This is an indictment under Espionage Act June 15, 1917, c. 30, tit. 1, § 3, 40 Stat. 219, as amended by Act May 16, 1918, c. 75, § 1, 40 Stat. 553 (Comp. St. 1918, § 10212c). The indictment upon which the defendant was originally placed on trial contained a number of counts, but all except the third, fourth, and seventh were withdrawn from the consideration of the jury.

The third count alleges that the defendant, when the United States was at war, uttered disloyal and abusive language about the form of government, and did by word support and favor the cause of Germany, and by word oppose the cause of the United States therein. It alleges in particular the following language:

"That the present war in which the United States is engaged is nothing but a Wall Street affair; that Germany is the most wonderful country in the world, and it could never be crushed by any other nations; that the war would last four or five years more, as the Germans were a marvelous people and the other nations could never cope with them; that Germany could easily crush the Allies, because the Germans worked under one general, Hindenburg, and the Allies were deficient in maneuvers, and the United States would have to fight the battle alone; that it was unreasonable and unjust for the United States to have gone into the present war; that in Germany, public affairs like the army and navy were run by men, but in this country they were run by women, Mrs. Wilson, for example; that the material written in the newspapers is ridiculous, that the Kaiser is not pictured as he truly is, that he is a wonderfully clever man, good and just, well versed in all the arts, and that he would be a wonderful man, even if he were not the Kaiser; that he was very indignant when asked to subscribe to the Red Cross, that he did not believe in it, and that those collecting for it received a commission; that

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Japan and Mexico would soon be in this war against this country; that the schools in this country were failures."

The fourth count alleges that the defendant uttered—

"disloyal, scurrilous and abusive language about the military and naval forces of the United States, and language intended to bring the military and naval forces of the United States into contempt, scorn, contumely, and disrepute, and in particular, the following language, to wit: That the army of the United States is not loyal, and that almost any of our soldiers could be bought for a very small sum; but that the army of the Kaiser was absolutely loyal, and that the men over there would give their lives if necessary in response to the Kaiser's wish, but that no dependence could be placed on the American soldier."

The seventh count alleges that the defendant uttered—

"disloyal and abusive language about the flag of the United States, and language intended to bring the flag of the United States into contempt, scorn, contumely, and disrepute, and in particular, the following language, to wit (speaking to a person wearing a flag pin and referring to the flag pin): 'Remove that thing from your coat. I do not like it.'"

That portion of the Espionage Act which is involved in this case reads as follows:

"Whoever, when the United States is at war, shall willfully utter, print, write or publish any disloyal, profane, scurrilous or abusive language about the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, * * * or any language intended to bring the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States, or the uniform of the army or navy of the United States into contempt, scorn, contumely or disrepute, or shall willfully utter, print, write or publish any language intended to incite, provoke or encourage resistance to the United States or to promote the cause of its enemies, * * * and whoever shall by word or act support or favor the cause of any country with which the United States is at war, or by word or act oppose the cause of the United States therein, shall be punished," etc.

It is assigned for error that a demurrer to the third count of the indictment was overruled. There are assignments of error in reference to the admission of evidence, sometimes with no exception taken thereto. There are assignments of error for refusals to charge as requested, although in each instance no exception was taken. There are assignments of error as to the charge itself, one of them covering nearly a whole page of the printed transcript; but no exceptions were taken at the time to any portion of the charge as delivered. And in examining what purports to be the transcript of record we find it contains no bill of exceptions and no certificate of any kind from the judge as to the correctness of anything contained in the transcript relating to the proceeding at the trial.

[1] This being a criminal case and tried in a common-law court, the method by which to review it is by writ of error. It has, however, been brought into this court on appeal; the defendant in his petition for appeal praying that "a transcript of the record, proceedings, and documents upon which said decree was based, duly authenticated," be sent to this court. What purports to be a transcript of the record is here; whether it is duly authenticated and can be considered is a

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question which the court must decide. A writ of error is of common-law origin, and it was used to review simply alleged errors of law, committed in a common-law action. In such actions there were no errors of facts to be reviewed, as the juries were sole judges of the facts. An appeal, on the other hand, is a process of civil-law origin, and was employed to review errors of fact and of law committed by courts of equity or admiralty and maritime jurisdiction, in which the judges passed on the facts as well as the law. The distinction between the common-law jurisdiction and the equity jurisdiction is maintained in the courts of the United States, and until Congress passed Act Sept. 6, 1916, c. 448, § 4, 39 Stat. 727, if an appeal was taken in a common-law action or a writ of error in an equity suit the appellate court could not have considered it. But the act referred to, which can be found in the margin,[1] provides that an appeal shall not be dismissed solely because a writ of error should have been sued out. U. S. Compiled St. (1916) Ann. vol. 3, § 1649a, p. 3275.

Whatever the exact meaning of the above act may be, it certainly does not mean that the appellate court shall have the right, where a criminal case is brought up on an appeal, to exercise the same comprehensive powers of review which it is entitled to exercise where an appeal is rightfully taken. To hold that such was the intention would be to make the act unconstitutional, as it would make the court the final judge of the facts as well as of the law in a class of cases where there is a constitutional right to a trial by jury, whose verdict is decisive as to the facts. A possible construction may be that we are simply to regard the appeal as though a writ of error had been sued for and granted, and that we should in all other respects proceed accordingly, so that the record should be required to be certified to the court in the same manner that would be required if a writ of error, instead of an appeal, had been sued out. Another possible construction may be that the statute is not to be so narrowly construed, but, being remedial in its nature, is to be understood as meaning that if an appeal has been taken, and the record has come up, not as it would be required to come up on a writ of error, but as it would come up on an appeal, the appellate court is then to proceed in the same manner as though the case was before the court on a writ of error and a record certified as required in common-law actions. We do not decide which of these two constructions is to be given to the act. In the view we take of this case it is unimportant which construction is correct. We should reach the same conclusion under either, so far as the questions here involved are concerned; for, whether the record be regarded as a record at law or a record in chancery, it is so defective in either case that this court cannot consider it, even under the act of 1916, whatever construction be given to the act.

We shall consider the case now upon the theory that under the

[1] "No court having power to review a judgment or decree rendered or passed by another shall dismiss a writ of error solely because an appeal should have been taken, or dismiss an appeal solely because a writ of error should have been sued out, but when such mistake or error occurs it shall disregard the same and take the action which would be appropriate if the proper appellate procedure had been followed."

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act the record should come into this court in the manner it would have been required to come under a writ of error; and, as we shall see, a writ of error implies a bill of exceptions, where certain erroneous rulings are to be reviewed, and the record is here, as already stated, without a bill of exceptions.

[12] We shall first consider the necessity of a bill of exceptions, and the effect of its omission. A bill of exceptions is a formal statement in writing of the exceptions duly taken at the trial to the decisions and instructions of the judge, with so much of the testimony as is necessary to enable the court to say whether error of law was committed in respect to the particular decisions or instructions to which the exceptions were taken.

Prior to the statute of Westminster (13 Edw. I, c. 31), the only errors reviewable at common law on a writ of error were those disclosed on the face of the record; and according to the English common law the "record" consisted of the pleadings, process, verdict, and judgment. But by the statute mentioned, enacted in 1385, provision was made for a bill of exceptions by which erroneous rulings might be brought before the appellate tribunal. The provisions of that statute may be found in the margin.[2]

In 3 Wharton's Criminal Procedure (10th Ed.) § 1705, that writer declares that, so far as concerns criminal cases at common law, it has always been held in this country that bills of exceptions do not lie. He adds that in England a bill of exceptions has never been allowed at common law in cases of felony and treason. And in section 1712 he states that in most jurisdictions bills of exceptions in criminal prosecutions are now allowed by statutes of comparatively recent adoption. As the case under consideration is not civil, but criminal, how is it, then, that a bill of exceptions is necessary to raise the questions counsel ask the court to review?

The Judiciary Act of 1793 limited the appellate jurisdiction of the Supreme Court to civil cases, and until 1879 no revisory jurisdiction over the District Courts in criminal cases was given to the Circuit Courts. But the act of 1879 (Act March 3, 1879, c. 176, 20 Stat. 354), gave authority to sue out a writ of error to revise a criminal trial in the District Courts in cases where the sentence imposed was imprisonment or fine exceeding $300 in amount. And the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1087, 1133), now in force, in section 128 confers on the Circuit Courts of Appeals appellate jurisdiction to review by appeal or writ of error final decisions in the District Courts

[2] "When one that is unpleaded before any of the Justices doth allege an Exception, praying that the Justices will allow it, which if they will not allow, if he that alleged the Exception do write the same Exception, and require that the Justices will put to their Seals for a Witness the Justices shall so do; and if one will not, another of the Company shall. (2) And if the King, upon Complaint made of the Justices, cause the Record to come before him, and the same Exception be not found in the Roll, and the Plaintiff shew the Exception written, with the Seal of a Justice put to, the Justice shall be commanded that he appear at a certain Day, whether to confess or deny his Seal. (3) And if the Justice cannot deny his Seal, they shall proceed to Judgment according to the same Exception, as it ought to be alleged or disallowed." Statutes at Large, vol. I, p. 99.

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in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court unless otherwise provided by law. In granting that authority to the Circuit Courts of Appeals, the Code makes no distinction between decisions in civil and in criminal cases. U. S. Comp. St. (1916) Ann. vol. 2, § 1120, p. 1389. And as a judgment in an action at law was reviewable only on writ of error, it was by means of that writ that a judgment of conviction in a criminal case was to be reviewed in this court. That writ commands the trial judge to send the record and proceedings to this court, in order that it may be inspected, to find whether any error of law has been committed, and, if it has, that this court may cause further to be done therein to correct that error. Then the statute requires that there shall be returned with the writ of error, at the day and place therein mentioned, "an authenticated transcript of the record, an assignment of errors, and a prayer for reversal, with a citation to the adverse party." U. S. Compiled Statutes (1916) vol. 3, § 1653, p. 3280. But when Congress authorized the proceedings in a criminal case to be reviewed upon a writ of error, it thereby sanctioned the use of a bill of exceptions; for the writ of error brings up the "record," and the bill of exceptions is the method by which the proceedings at the trial, which otherwise would not be in the record, are made a part of it and so reviewed.

[2] A statute which authorizes a writ of error to be sued out thereby allows a bill of exceptions to be signed and used in connection therewith, for it is only through it that the erroneous rulings of the judge made at the trial upon points of law become a part of the record to be reviewed. While no act of Congress in express terms authorized the judges to sign bills of exceptions in civil or criminal cases, Congress recognized the use of such bills by providing how they are to be authenticated by the judges. U. S. Comp. St. (1916) Ann. § 1590, p. 3168. And in 1914, in providing for a review of a conviction in cases of criminal contempt, it expressly authorized the evidence in such cases to be preserved by bill of exceptions, and authorized a review of the judgment "upon writ of error in all respects as now provided." U. S. Comp. St. (1916) Ann. vol. 2, § 1245c. We know of no other express reference to a bill of exceptions in the acts of Congress.

The clerk of the court below has certified that the transcript is "a correct and complete transcript of the record." But matters which are no part of the record proper were only made a part thereof by the judge, and the inclusion of such matters into the record by the clerk of the court and his certification of the record did not authenticate them or authorize their review by the appellate tribunal. Galvey v. Baker, 5 Cl. & F. 157; Steffy v. People, 130 Ill. 98, 22 N. E. 861; Lewis v. Godman, 129 Ind. 359, 27 N. E. 563; Thompson v. Lyon, 14 Cal. 39; Whitfield v. Westbrook, 40 Miss. 311. In Lessor of Fisher v. Cockerell, 5 Pet. 248, 254, 8 L. Ed. 114 (1831), Chief Justice Marshall, speaking of the rule common to all courts exercising appellate jurisdiction, according to the course of the common law, said:

"The appellate court cannot know what evidence was given to the jury, unless it be spread on the record in proper legal manner. The unauthorized cer-

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tificate of the clerk that any document was read, or any evidence given, to the jury, cannot make that document or that evidence a part of the record, so as to bring it to the cognizance of this court."

The transcript contains what the parties call a "Stipulation re Contents of Record," in which it is stipulated that in connection with the "appeal" to this court the record shall contain certain counts of the indictment, the demurrer to the third count, the testimony of the witnesses, certain exhibits and motions, the requests to charge, and the assignments of errors. It is to be observed of this stipulation that the parties have simply stipulated that the record shall contain certain matter, as, for example, "the testimony of the following witnesses." It is not even a stipulation that the testimony and rulings which appear in the transcript are correct. But, irrespective of the character of the particular stipulation, it must be said that a stipulation does not make the matter so stipulated a part of the record. It cannot be regarded as "an agreed statement of facts."

The Supreme Court has said that a writ of error may bring up "an agreed statement of facts," without a bill of exceptions. But that is where the parties after issue joined agree upon the facts and submit the statement to the trial court in the form of a special case for its judgment without proceeding to trial. Where this was done, it was the rule in England that there could be no writ of error, as an agreed case never was a part of the record, so that there was nothing upon the record upon which an appellate tribunal could act. Mr. Justice Blackstone in his Commentaries (volume 3, p. 378), in speaking of this, said:

"Nothing appears upon the record, but the general verdict; whereby the parties are precluded from the benefit of a writ of error."

This matter was referred to at some length in United States v. Eliason, 16 Pet. 291, 299, 300, 10 L. Ed. 968, and the court declared that in the United States a writ of error could be brought upon an agreed case, it being authorized by the long-established practice of this country. But clearly the stipulation of counsel which is contained in the record of this case bears no resemblance to "an agreed statement of facts," within the doctrine stated in United States v. Eliason, supra.

[3] And where there has been an actual trial the general rule seems to have been that the parties were not at liberty to substitute a written stipulation or agreed statement of facts as to what occurred at the trial in lieu of the bill of exceptions required. Wessels v. Beeman, 66 Mich. 343, 33 N. W. 510; Pearce v. Clements, 73 Ala. 257; State v. Weiskittle, 61 Md. 48; Richardson v. State, 28 Fla. 350, 9 South. 704; Herbison v. Taylor, 29 Neb. 217, 45 N. W. 626. In Houlehan v. Rassler, 73 Wis. 559, 41 N. W. 720, it was held that papers may form a bill of exceptions by stipulation of attorneys when ordered by the court to be made part of the record.

In Inglee v. Coolidge, 2 Wheat. 363, 4 L. Ed. 261, decided 100 years ago, there was no bill of exceptions, but the transcript contained the trial judge's report of the evidence. Mr. Webster argued that it

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could not be considered any part of the record, and that the matter objected to should have been put on the record by a bill of exceptions, and, that not having been done, the writ should be dismissed. That course was pursued, and Mr. Justice Story stated that all the Justices were unanimously of the opinion that the report of the judge could not be considered as a part of the record.

In Suydam v. Williamson, 20 How. 427, 437, 15 L. Ed. 978 (1857), the transcript contained what purported to be all the evidence introduced at the trial, that given on behalf of the defendant and that given on behalf of the plaintiffs, and certain offers of proof on the part of the plaintiffs which were objected to by the defendant and excluded by the court. This mass of evidence filled 60 pages of the transcript. It was in the form of a report by the judge who tried the case. It was signed by him and under his seal. But the court declined to consider it, because it was not a bill of exceptions. And the court declared:

> "And we also say that this court cannot so far depart from the settled practice and regular course of proceeding as to give an effect to the paper which neither its contents nor terms would warrant."

There are other cases decided by the same court to the same effect and cited in the opinion.

[4] The general rule has been that in actions at law evidence introduced, or offered and rejected, at the trial, and rulings thereon, can be brought before the appellate court only by a bill of exceptions. In Porto Rico v. Emmanuel, 235 U. S. 251, 255, 35 Sup. Ct. 33, 35 (59 L. Ed. 215), the court declared that:

> "In the absence of a bill of exceptions, questions respecting the admissibility of evidence are of course excluded from our consideration, and the review is confined to what appears upon the face of the pleadings and the findings. Rosaly v. Graham, 227 U. S. 584, 590 [33 Sup. Ct. 333, 57 L. Ed. 655], and cases cited."

And see England v. Gebhardt, 112 U. S. 502, 505, 5 Sup. Ct. 287, 28 L. Ed. 811; Norris v. Jackson, 9 Wall. 125, 19 L. Ed. 608; Berly v. Taylor, 5 Hill (N. Y.) 579; Litsey v. Moffett, 29 Kan. 507; Lee v. Mound Station, 118 Ill. 304, 8 N. E. 759; Waddell v. Cunningham, 27 Fla. 477, 8 South. 643; Joiner v. Van Alstyne, 20 Neb. 578, 30 N. W. 944.

Unless a statute otherwise provided, a bill of exceptions has been the sole mode by which instructions and requests to charge could be brought into the appellate court for review. In Stanton v. Embry, 93 U. S. 548, 555, 23 L. Ed. 983, the court said that unless the exceptions to the rulings of the court in the progress of the trial, or to the instructions given to the jury are signed by the judge, or sealed with his seal, it is not a bill of exceptions within the meaning of the statute authorizing such proceeding, nor does it become a part of the record. The seal of the judge is no longer required, but his signature or that of another judge of the court is all that is required in accordance with the statute. U. S. Compiled Statutes (1916) Ann. vol. 3, § 1590. In Storm v. United States, 94 U. S. 76, 24 L. Ed. 42, the court declared that the instructions given by the court to the jury are no part of the record, unless made so by a proper bill of excep-

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tions. And see Struthers v. Drexel, 122 U. S. 487, 491, 7 Sup. Ct. 1293, 30 L. Ed. 1216; Anderson v. Fitzgerald, 4 H. L. Cas. 484; Wagar v. Peak, 22 Mich. 368; Toledo v. Preston, 50 Ohio St. 361, 34 N. E. 353; Collins v. Breen, 75 Wis. 606, 44 N. W. 769; Forest v. Crenshaw, 81 Ky. 51.

[5] The rule has been elementary, and applicable in criminal proceedings as well as in civil, that a ruling of the trial court upon the admissibility of evidence will not be reviewed in the appellate court, unless the bill of exceptions shows that an exception was taken after the objection was overruled. Commonwealth v. Foster, 182 Mass. 276, 65 N. E. 391; People v. Murphy, 135 N. Y. 450, 32 N. E. 138; Bond v. State, 103 Ala. 90, 15 South. 893; Hunt v. State, 116 Ga. 615, 42 S. E. 1004; Moeck v. People, 100 Ill. 242, 39 Am. Rep. 38; State v. Lynn, 169 Mo. 664, 70 S. W. 127; Commonwealth v. McGowan, 189 Pa. 641, 42 Atl. 365, 69 Am. St. Rep. 836; People v. Miller, 122 Cal. 84, 54 Pac. 523; Kearney v. State, 46 Md. 422; State v. Powers, 72 Vt. 168, 47 Atl. 830; Post v. Hartford St. Railway, 72 Conn. 362, 44 Atl. 547. In Michigan Insurance Bank v. Eldred, 143 U. S. 293, 298, 12 Sup. Ct. 450, 36 L. Ed. 162, Mr. Justice Gray stated the rule and declared that by the uniform course of decision no exceptions to rulings could be considered, unless they were taken at the trial and were also embodied in a formal bill of exceptions. And in United States v. United States Fidelity Co., 236 U. S. 512, 529, 35 Sup. Ct. 298, 59 L. Ed. 696, the court pointed out that the essential function of an exception was to direct the mind of the trial judge to the precise point in which it is supposed that he has erred in law, so that he may reconsider it and change his ruling, if convinced of error, so that mistrials due to inadvertent errors may be obviated. The court held, therefore, that an exception furnishes no basis for reversal upon any ground other than the one specifically called to the attention of the trial court.

[6] And the courts of the United States have applied the rule, even if the courts of the state within which they were sitting did not; for it is well settled that the rules and practice which prevail in the state courts do not apply to proceedings in the federal court. The act of Congress (section 1537, vol. 3, U. S. Compiled Statutes 1916 Ann.), directing that the practice, pleadings, and forms and modes of proceeding in the District Courts should conform to the practice, pleadings, and forms and modes of proceeding in the courts of the state has no application to bills of exceptions, or to the mode of reviewing a decision once made in the District Court. Chateaugay Iron Co.,Petitioner, 128 U. S. 544, 553, 9 Sup. Ct. 150, 32 L. Ed. 508; N. Y. & N. E. R. Co. v. Hyde, 56 Fed. 188, 5 C. C. A. 461.

In most jurisdictions it is the rule that the appellate court does not review, even in a criminal case, an erroneous instruction or an erroneous refusal to charge, unless the same was excepted to at the trial. People v. Burt, 170 N. Y. 560, 62 N. E. 1099; Knoll v. State, 55 Wis. 249, 12 N. W. 369, 42 Am. Rep. 704; Steffy v. People, 130 Ill. 98, 22 N. E. 861; Bush v. State, 47 Neb. 642, 66 N. W. 638; Barnes v. State, 113 Ga. 189, 38 S. E. 396; State v. Williams, 115 Iowa, 97, 88 N. W.

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194; State v. Vinso, 171 Mo. 576, 71 S. W. 1034. The rule has been applied in the federal as well as in the state courts. Myers v. Pittsburgh Coal Co., 233 U. S. 184, 195, 34 Sup. Ct. 559, 58 L. Ed. 906; Humes v. United States, 170 U. S. 210, 212, 18 Sup. Ct. 602, 42 L. Ed. 1011; St. Clair v. United States, 154 U. S. 134, 153, 14 Sup. Ct. 1002, 38 L. Ed. 936; Tucker v. United States, 151 U. S. 164, 14 Sup. Ct. 299, 38 L. Ed. 112.

Motions made during the progress of a cause and the rulings of the court granting or denying them could be brought before the appellate court only by a bill of exceptions. Wiggins v. Witherington, 96 Ala. 535, 11 South. 539; White v. Douglas, 51 Kan. 402, 32 Pac. 1092; Fleming v. Bainbridge, 84 Ga. 622, 10 S. E. 1098; Richardson v. Eureka, 92 Cal. 64, 28 Pac. 102; Burns v. People, 126 Ill. 284, 18 N. E. 550.

From what has been said it is evident that, unless the established rules of law have been changed by recent legislation, this court is not at liberty to review the evidence, to see whether any testimony has been erroneously admitted, or whether there were errors in the charge as actually given, or whether any requests to charge were improperly refused. In Struthers v. Drexel, supra, the Supreme Court declared that the matters not spread upon the record in legal manner are not in the record for any purpose; and it is also evident that, if the testimony and the charge and the requests to charge had been put into the record by a bill of exceptions, the court would still be powerless to review any ordinary errors therein for want of exceptions duly taken.

[7] But we find that Congress by an act approved on February 26, 1919 (40 Stat. 1181, c. 48), has amended section 269 of the Judicial Code by providing that:

> "On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

It becomes necessary therefore to consider to what extent this act has modified the principles above laid down. We are to examine "the entire record before the court." Now, we have seen that under the decisions of the Supreme Court the testimony and the charge and refusals of requests to charge are not in the record before the court, although they may be found in the transcript, unless they have been put into the record by a bill of exceptions. We are not prepared to say that it was the intention of the Congress, by the act recently passed, to make bills of exceptions no longer necessary, and that hereafter we are to hold that any matter found in the transcript is to be regarded as in the record, even though the trial judge has not examined and certified to its correctness by putting his signature to a bill of exceptions. We do not think that such could have been the intention. The "record" to which the act refers is that which is legally the record, and in examining that we are to disregard "technical errors, defects or exceptions which do not affect the substantial rights of the parties." But matters which could not have been regarded as in the record prior

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to the passage of the act are not to be held to be in the record since the passage of the act. We are still unable to review the evidence, the charge, and the refusals to charge.

[8] The indictment, however, is properly in this court, as it is a part of the record, and needs no bill of exceptions to make it such. And no bill of exceptions is necessary to make the demurrer to the third count a part of the record proper. State v. Strong, 6 Iowa, 72; State v. Day, 52 Ind. 483; Ex parte Knight, 61 Ala. 482; 3 Encyc. Pleading & Practice, p. 407, note. We therefore set forth in the beginning of this opinion the counts upon which the defendant was tried, and the part of the Espionage Act for the violation of which the indictment was found. It seems to be conceded that the statute is constitutional, and indeed its constitutionality has been established by the Supreme Court. See Schenck v. United States, 249 U. S. 47, 39 Sup. Ct. 247, 63 L. Ed. 470; Debs v. United States, 249 U. S. 211, 39 Sup. Ct. 252, 63 L. Ed. 566; and Frohwerk v. United States, 249 U. S. 204, 39 Sup. Ct. 249, 63 L. Ed. 561. These cases were decided by that court on the day this case was argued, and they have not yet been officially reported; and the indictment is to be considered in the light of what the court declared in the Schenck Case. It there said:

"We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. * * * The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. * * * The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no court could regard them as protected by any constitutional right."

[9] Now, whether, in view of the above statement, the third count should be held good or bad, is under the circumstances not material to the disposition we must make of this case; for the fourth and seventh counts are good and sufficient and no demurrer was interposed as to them. The verdict of the jury is, like the indictment, a part of the record, and is not dependent on a bill of exceptions; and it appears that the jury found the defendant guilty upon all three counts. The judgment is in like manner a part of the record, but it has not been included in the transcript. As it does not affirmatively appear that the court, in imposing sentence, directed that the sentences were to run successively, we need not assume that such a direction was given; and, if it was not given, the invalidity of the third count, if it be invalid, would not justify a reversal, for unless the court imposing sentence under each of several counts, does not direct that imprisonment under one count is not to run concurrently with imprisonment under the others, the punishments under all the counts are executed simultaneously, and the fact that one of the

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counts is defective does not entitle the defendant to a release from imprisonment. Reg. v. King (1897) 18 Cox C. C. 447; In re Breton, 93 Me. 39, 44 Atl. 125, 74 Am. St. Rep. 335; In re Jackson, 3 MacArthur (D. C.) 24.

[10] We may point out, although the question is not directly involved in this case, that it is the law of the federal courts, as it is of state courts as well, that where an indictment contains good and bad counts, and a general verdict is returned, the verdict will be referred to the good counts, if sustained by the evidence, and the judgment of the court will be affirmed. Dunbar v. United States, 156 U. S. 185, 15 Sup. Ct. 325, 39 L. Ed. 390; State v. Stebbins, 29 Conn. 463, 79 Am. Dec. 223; Hope v. People, 83 N. Y. 418, 38 Am. Rep. 460; Mead v. State, 53 N. J. Law, 601, 23 Atl. 264; Commonwealth v. Howe, 13 Gray (Mass.) 26.

[11] We come now to consider whether a different conclusion would be reached if the act of 1916 should be construed as authorizing the appellate court to review the record in a criminal case which is brought here on appeal where the record comes up as it would come up in appeals in equity cases. A bill of exceptions, so necessary in common-law actions coming up on a writ of error, was unknown to equity. Chief Justice Taney said, in Ex parte Story, 12 Pet. 339, 9 L. Ed. 1108: "A bill of exceptions is altogether unknown in chancery practice." And in Johnson v. Harmon, 94 U. S. 371, 24 L. Ed. 271, Mr. Justice Bradley said: "A bill of exceptions cannot be taken on the trial of a feigned issue directed by a court of equity, or, if taken, can only be used on a motion for a new trial made to said court." Watts v. Starke, 101 U. S. 247, 250, 25 L. Ed. 826.

The Supreme Court has the power to regulate the practice in suits in equity in the federal courts. This it has done by the equity rules promulgated on November 4, 1912.[3] The matter of the record on appeal is regulated by rule 75. And the record which we find in the transcript does not conform to the regulations there prescribed. It is provided in paragraph "b" of the rule referred to:

> "That the evidence to be included in the record shall not be set forth in full, but shall be stated in simple and condensed form, all parts not essential to the decisions of the questions presented by the appeal being omitted and the testimony of witnesses being stated only in narrative form, save that if either party desires it, and the court or judge so directs, any part of the testimony shall be reproduced in the exact words of the witness."

None of the testimony in the record has been reduced to narrative form, but all of it appears in the exact words of the witnesses, and there is nothing to show that the court or judge directed that any portion of it should be in the exact words of the witnesses. The rule also provides that:

> "If the statement be true, complete and properly prepared, it shall be approved by the court or judge, and if it be not true, complete or properly prepared, it shall be made so under the direction of the court or judge and shall then be approved. When approved, it shall be filed in the clerk's office and become a part of the record for the purposes of the appeal."

[3] 226 U. S. 629, 33 Sup. Ct. xix; 198 Fed. xix, 115 C. C. A. xix.

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It is evident that it was not intended that the testimony should become a part of the record without the approval of the judge, and until it has been approved by him it is not a part of the record for the purposes of the appeal. And as the testimony in the transcript in this case is not there in conformity to rule 75 we cannot consider it.

Rule 77 authorizes questions presented by an appeal to be presented upon an agreed statement, when it can be done without an examination of all the pleadings and evidence. But this can only be done "with the approval of the District Court or the judge thereof." There is nothing of that sort in this record.

Rule 75 deals only with the testimony. It does not expressly refer to rulings made by the judge during the trial, either on motions or as to the admission of evidence, or refusals to charge or as to the charge as actually given. Prior to rule 75 testimony in an equity case had to be made in some way a part of the record. It did not become a part of the record simply because it had been given or received in the court below, even though it found its way into the transcript. That appears in Blease v. Garlington, 92 U. S. 1–7, 23 L. Ed. 521, where Chief Justice Waite, writing for the court, stated that it would not say that since the Revised Statutes the courts under the operation of the rule might not in their discretion in an equity suit permit the examination of witnesses orally in open court, adding that, if such practice is adopted in any case, the testimony presented in that form must be taken down, or its substance stated in writing, "and made a part of the record, or it will be entirely disregarded here on appeal." But there is nothing in the opinion which indicates how the testimony was to be made a part of the record.

The matter was considered at length in Southern Building & Loan Association v. Carey (C. C.) 117 Fed. 325 (1902). The court found it a perplexing subject. "How is that testimony to be taken," asks Judge Hammond, "and transmitted to the appellate court? Strange to say, I do not find that question answered by the cases or the books on practice or the rules, any more than the one we have in hand,[4] and the necessity for a rule governing the practice is apparent." Present rule 75 no doubt was intended to provide an answer to the question above asked.

In Street's Federal Equity Practice, vol. 2, § 1629, which was published prior to the adoption of the present rules, that writer says, in speaking of the testimony taken in open court, that "such testimony should be expressly incorporated in the record by an order of the court and sent up on appeal, in order that the action of the court in accepting or rejecting the testimony may be reviewed." It "should be certified by the court as a part of the record." Then in section 1630 he says that though, strictly speaking, the bill of exceptions in an equity case is unknown, he declares that an order of the court directing that the evidence should be made a part of the record, and directing it to be sent up on appeal, will have the effect of a bill of exceptions.

[4] The reference was to old equity rule 67 (149 U. S. 793, 13 Sup. Ct. 111), the last paragraph.

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In Whitehouse's Equity Practice, vol. 1, § 514, the writer states that in preparing an equity case for an appellate court, after the evidence has been reduced to typewritten form, it "is approved by the chancellor or presiding justice, and the whole record thus made up from the pleadings and evidence is then certified by the clerk to be correct, and each printed copy by him as a true copy, and the record is transmitted to the clerk of the appellate court." He is not speaking specifically of the practice in the federal courts, but in the courts of the United States generally—state and federal. And we may add that we know of no way of getting into the record on an appeal the requests to charge a jury and the instructions to the jury, when those requests and instructions have not been certified by the judge.

From what has been said it sufficiently appears that, whatever construction is to be placed on the act of 1916, the record in this case is not sufficient to enable us to pass upon the admissibility of evidence, or the alleged errors in the instructions as given, or in the failure to instruct as requested.

We may add that, whatever may or may not have been the practice in this circuit prior to 1912 in the matter of preparing the record in an appeal, the subject is governed by rules 75, 76, and 77, as framed by the Supreme Court, and that there is no power in this court to exempt a particular case from their operation. The rules, having been promulgated under the authority of an act of Congress, have the authority of statutory regulation. Winter v. Ludlow, 104 Fed. Cas. No. 17,891.

In conclusion it may be said that under rule 8 of the Rules of the Supreme Court, promulgated by the court on December 22, 1911,[5] a bill of exceptions certified by the judge is no longer required, and that matters may get into the record by stipulation of counsel or the clerk's certificate. This seems to us an utterly erroneous view. That it is unsound conclusively appears from the decisions of the court made since the rules were promulgated. In People of Porto Rico v. Emmanuel, supra, decided in 1914, three years after the rules were promulgated, the court, as we have before pointed out, declared that in the absence of a bill of exceptions questions of the admissibility of evidence are excluded, and the review is confined to what appears upon the face of the pleadings and the findings. And in Cerecedo v. United States, 239 U. S. 1, 3, 36 Sup. Ct. 3, 4 (60 L. Ed. 113), decided on October 25, 1915, the court said:

> "There is no bill of exceptions in the record, and nothing which enables us to lawfully ascertain the existence of the constitutional questions relied upon."

And after saying that because of the absence of the bill of exceptions there was nothing before the court it added:

> "Even indulging, for the sake of the argument only, in the assumption of the correctness of the proposition urged that an extraordinary discretion might exist in some extreme case to supply the entire absence of a bill of exceptions, we see no ground whatever for the premise that this is a case of that character."

[5] 222 U. S. 669, 32 Sup. Ct. vi.

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In view of these decisions it is idle to say that on a writ of error a bill of exceptions can be dispensed with since rule 8 was promulgated; and if it cannot be dispensed with it is as true now as it ever was that matters of evidence and requests to charge and the instructions do not get into the "record" without a bill of exceptions where there is a writ of error, and neither the act of 1916 nor the act of 1919 dispenses with the necessity of getting matters to be reviewed into the "record" by the action of the judge.

We may, however, say in passing that on the argument in this court great stress was laid on the admission in evidence of certain cards found in the defendant's room which had on their backs, in what was alleged to be defendant's handwriting, statements which disclosed a hostile or unfriendly feeling for the United States. The writing on one was:

> "Wilson is the meanest coward that ever ran around on two legs. God's curse upon American—German-Americans, too."

That on the other was:

> "Germany did not break her pledges. You have not won yet. One German is as good as 299 Americans. Americans have not got any blood; they are milk and water creatures."

While for reasons already stated we do not feel called upon to notice any alleged errors in the admission of evidence, we may concede that the reasons given for admitting the cards were erroneous. They could not properly be received, either on the question of credibility or for the purpose of showing that defendant made the statements the indictment charged him with having made. But in our opinion it is equally plain that the cards were admissible for the purpose of showing intent, or motive, which has been called the mother of intent; and, being admissible it is of no consequence that some other reason not tenable was assigned for the admission of the testimony at the time.

This court has recently had occasion to speak plainly concerning the record which has been presented here in two criminal cases brought up on writs of error. In one of them, Linn v. United States, 251 Fed. 476, 163 C. C. A. 470, there was no true bill of exceptions, although there was something which purported to be a bill and was settled and allowed by the District Judge as such. In the other, Fraina v. United States, 255 Fed. 28, 166 C. C. A. 356, there was a transcript of the stenographer's minutes which the parties called a bill of exceptions, and this court condemned. And in the present case, which is wrongly brought here upon an appeal, we neither have a bill of exceptions nor anything else which we can legally notice, unless it be the sufficiency of one of the counts of the indictment. We feel obliged to call attention to this matter again, so that in subsequent cases in this court the rights of parties may not be prejudiced or lost by the failure to get before the court a record which at least raises the questions which it is desired to have decided.

Judgment affirmed.

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WARD, Circuit Judge (dissenting). The construction of the Act of September 6, 1916, § 4 (Comp. St. § 1649a), is so important that I feel obliged to express an opinion about it. These provisions are as follows:

Act of 1916. "Sec. 4. No court having power to review a judgment or decree rendered or passed by another shall dismiss a writ of error solely because an appeal should have been taken, or dismiss an appeal solely because a writ of error should have been sued out, but when such mistake or error occurs it shall disregard the same and take the action which would be appropriate if the proper appellate procedure had been followed."

This act is obviously remedial and entitled on familiar principles to a liberal construction. It may be construed as meaning merely that an appeal as a formal paper should be treated as if it were in the form of a writ of error, and that a writ of error as a formal paper should be treated as if it were in the form of an appeal; the wrong process in either case having been used. If so, the appellate court, where an appeal has been taken in an action at law, cannot consider exceptions taken at the trial, although the testimony and exceptions are brought before it in a manner proper for an appeal, because they are not brought up by a bill of exceptions and therefore would not be technically before the court in an action at law.

I am not clear whether the opinion of the court goes so far, and am assuming it to hold that the testimony and exceptions in this case were not before it, because the record had not been approved by the judge as required by Supreme Court equity rule 75(b). Before that rule was adopted it had never been the practice in equity to submit records to the trial judge for approval. This appears from the last rules of the Supreme Court promulgated at October term, 1911. 222 U. S. 669, 32 Sup. Ct. vi. Rule 8 (1) provides:

"1. The clerk of the court to which any writ of error may be directed shall make return of the same, by transmitting a true copy of the record, and of the assignment of errors, and of all proceedings in the case, under his hand and the seal of the court.

"In order to enable the clerk to perform such duty and for the purpose of reducing the size of transcripts of record in cases brought to this court by appeal or writ of error, by eliminating all papers not necessary to the consideration of the questions to be reviewed, it shall be the duty of the appellant or plaintiff in error or his attorney to file with the clerk of the lower court, together with proof or acknowledgment of service of a copy on the appellee or defendant in error, or his counsel, a præcipe which shall indicate the portions of the record to be incorporated into the transcript of the record on such appeal or writ of error. Should the appellee or defendant in error, or his counsel, desire additional portions of the record incorporated into the transcript of the record to be filed in this court, he shall file with the clerk of the lower court his præcipe also, within ten days thereafter (unless the time shall be enlarged by a judge of the lower court or by a justice of this court), indicating such additional portions of the record desired by him.

"The clerk of the lower court shall transmit to this court as the transcript of the record in the case only the portions of the record below designated by both parties as above provided.

"The parties or their counsel, however, may agree by written stipulation to be filed with the clerk of the lower court the portions of the record which shall constitute the transcript of record on appeal or writ of error, and the clerk in such case shall transmit only the papers designated in such stipulation.

"If this court shall find that portions of the record unnecessary to a proper

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presentation of the case have been incorporated into the transcript by either party, the court may order that the whole or any part of the clerk's fee for supervising the printing and of the cost of printing the record be paid by the offending party."

It will be seen that there is no suggestion whatever of any approval of the record by the trial judge. On the contrary, it is to be made up by stipulation of the parties.

At October term, 1912 (226 U. S. 629, 33 Sup. Ct. xix; 198 Fed. xix, 115 C. C. A. xix), the new equity rules were promulgated. Rule 75 reads:

"In case of appeal:

"(a) It shall be the duty of the appellant or his solicitor to file with the clerk of the court from which the appeal is prosecuted together with proof or acknowledgment of service of a copy on the appellee or his solicitor, a præcipe which shall indicate the portions of the record to be incorporated into the transcript on such appeal. Should the appellee or his solicitor desire additional portions of the record incorporated into the transcript, he shall file with the clerk of the court his præcipe also within ten days thereafter, unless the time shall be enlarged by the court or a judge thereof, indicating such additional portions of the record desired by him.

"(b) The evidence to be included in the record shall not be set forth in full, but shall be stated in simple and condensed form, all parts not essential to the decision of the questions presented by the appeal being omitted and the testimony of witnesses being stated only in narrative form, save that if either party desires it, and the court or judge so directs, any part of the testimony shall be reproduced in the exact words of the witness. The duty of so condensing and stating the evidence shall rest primarily on the appellant, who shall prepare his statement thereof and lodge the same in the clerk's office for the examination of the other parties at or before the time of filing his præcipe under paragraph (a) of this rule. He shall also notify the other parties or their solicitors of such lodgment and shall name a time and place when he will ask the court or judge to approve the statement, the time so named to be at least ten days after such notice. At the expiration of the time named or such further time as the court or judge may allow, the statement, together with any objections made or amendments proposed by any party, shall be presented to the court or the judge, and if the statement be true, complete and properly prepared, it shall be approved by the court or judge, and if it be not true, complete or properly prepared, it shall be made so under the direction of the court or judge and shall then be approved. When approved, it shall be filed in the clerk's office and become a part of the record for the purposes of the appeal.

"(c) If any difference arise between the parties concerning directions as to the general contents of the record to be prepared on the appeal, such difference shall be submitted to the court or judge in conformity with the provisions of paragraph b of this rule and shall be covered by the directions which the court or judge may give on the subject."

Subdivisions (a) and (c), taken together, show that there need be no reference to the judge if the parties agree upon the general contents of the record. Subdivision (b), I think, comes into operation only if the parties cannot agree upon the manner in which the evidence has been condensed and the testimony reduced to narrative form. The purpose of both rules was to shorten the records and save expense in printing. The fact that the Supreme Court did not amend section 1 of rule 8 after new equity rule 75 had been adopted, and expressed no intention of changing the former practice in rule 75, convinces me that no change was intended. Thus both rules may be construed con-

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sistently with each other. The practice in the Southern district of New York has been in accordance with this view. The attorneys in equity causes almost without exception agree in writing upon the contents of the record without submitting it to the judge for approval. If the court is right in saying that the testimony and exceptions are not brought before it without such approval, it follows that for years we have been deciding equity causes upon the law and facts, so far as they depend upon the testimony contained in the record, without there being any testimony legally before us. Needless to say that the subject is one for grave reflection.

The attorney's intention to raise the exception in the present case is clear, because he has laid the testimony and the exception before the court in a record containing the written stipulation of the attorneys which the clerk certifies the parties have agreed to be correct and complete. The record is good within the equity rules.

Likewise it may be noted in favor of the practice that in admiralty causes it has never been the practice to submit the record for allowance. Supreme Court rule in admiralty LII(3), 29 Sup. Ct. xlv, expressly provides that the clerk of the District Court shall omit from the record any pleading, testimony or exhibits the parties by written stipulation of their proctors agree to omit and our rule in admiralty IV (3), 29 Sup. Ct. xxxix, contains a similar provision.

The act of 1916 proceeds further to require us to "take the action which would be appropriate if the proper appellate procedure had been followed." I read this to mean that a party shall not suffer for any procedural mistake of his attorney, and that we shall treat the record on appeal, so far as questions of law are concerned, as if he had been aware that a bill of exceptions was necessary to preserve the exceptions taken at the trial and had sued out a writ of error accompanied by the usual bill of exceptions.

I fully recognize that a writ of error sued out in an action at law does not bring exceptions taken in the course of the trial before the court, unless it is accompanied by a bill of exceptions signed by the trial judge. I also admit that neither Supreme Court rule 8 nor the act of 1916 makes any change in the law in this respect. The act of 1916 covers, not cases of regular, but of erroneous, procedure, and the precise question we are to determine is whether, when an appeal has been duly perfected in an action at law, exceptions taken at the trial and appearing in the record are to be disregarded, because no bill of exceptions has been signed by the judge, as required in an action at law.

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(258 Fed. 927)

BLUMENSTOCK BROS. ADVERTISING AGENCY v. CURTIS PUB. CO.

(Circuit Court of Appeals, Seventh Circuit. April 29, 1919.)

No. 2668.

COURTS ⟹403(5)—CIRCUIT COURTS OF APPEALS—APPELLATE JURISDICTION—CASES INVOLVING JURISDICTION OF LOWER COURT.

The Circuit Court of Appeals is without jurisdiction to review an order of a District Court dismissing a cause on the express grounds of want of jurisdiction.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Action by the Blumenstock Bros. Advertising Agency against the Curtis Publishing Company. Judgment of dismissal, and plaintiff brings error. On motion by defendant to dismiss writ of error. Motion granted.

Colin C. H. Fyffe, of Chicago, Ill., for plaintiff in error.

Amos C. Miller, of Chicago, Ill., for defendant in error.

Before BAKER and EVANS, Circuit Judges, and ENGLISH, District Judge.

BAKER, Circuit Judge. Plaintiff in error, a Missouri corporation, filed its declaration in the District Court for the Northern District of Illinois against defendant in error, a Pennsylvania corporation, purporting to state several causes of action under the Sherman Act and one under the common law. Defendant entered its special appearance and moved to dismiss the action on the ground that defendant was not suable in this district on the common-law count, and that the matter set forth in the other counts was not the kind of matter covered by the Sherman Act, and consequently no jurisdiction over the person of defendant was acquired by service upon an agent within the district.

The District Court ordered "that the service of process be and the same is hereby set aside, and that this cause be and the same is hereby dismissed for want of jurisdiction."

Defendant's motion here that the writ of error be dismissed, on the ground that appellate jurisdiction over the District Court's order is vested exclusively in the Supreme Court by virtue of sections 238 and 128 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1133, 1157 [Comp. St. §§ 1120, 1215]), must be sustained. United States v. Jahn, 155 U. S. 109, 15 Sup. Ct. 39, 39 L. Ed. 87; Marble Co. v. United States, 213 U. S. 10, 29 Sup. Ct. 324, 53 L. Ed. 675; United States v. Congress Construction Co., 222 U. S. 199, 32 Sup. Ct. 44, 56 L. Ed. 163; Male v. Atchison Railway Co., 240 U. S. 97, 36 Sup.

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Ct. 351, 60 L. Ed. 544; Merriam Co. v. Saalfield, 241 U. S. 22, 36 Sup. Ct. 477, 60 L. Ed. 868; Crawford v. McCarthy, 148 Fed. 198, 78 C. C. A. 356.

Plaintiff urges that, because the counts under the Sherman Act in truth state good causes of action, the District Court made an adverse decision on the merits, and therefore the merits are now reviewable in this court. But the order as entered proves beyond question that the District Court declined to consider the merits, because it found that it had no jurisdiction to hear them. If the District Court erred in that respect, we are without jurisdiction to say so; and we are likewise without jurisdiction to consider the merits in advance of a decision on the merits by the District Court.

The writ of error is dismissed.

(258 Fed. 928)

THE CORNELIA.

RED HOOK TOWING LINE v. GAUL.

(Circuit Court of Appeals, Second Circuit. May 14, 1919.)

No. 235.

MARITIME LIENS ⟹65—REPAIR WORK—EVIDENCE.

Evidence that a boiler was inspected and licensed after being repaired, etc., *held* to establish that libelant repaired boiler in a workmanlike manner, although it subsequently developed leaks and defects.

Appeal from the District Court of the United States for the Southern District of New York.

Libel by Ray Gaul against the tug Cornelia, her engines, etc., the Red Hook Towing Line, claimant, with cross-libel by the Red Hook Towing Line against Ray Gaul. From an adverse decree, the Red Hook Towing Line appeals. Affirmed.

The memorandum opinion of Mack, Circuit Judge, in the court below, is as follows:

The contract in this case was one for work and labor at $25 a day, at a reasonable price for the material. The boiler in question was old; it was to be welded by the acetylene process. Libelant did not guarantee the result of his work; his obligation was to do the job in a workmanlike way. In my judgment, this was done. In the absence of proof showing incompetency or fraud on the part of the inspector, the inspection and license granted in January, 1917, is the strongest evidence that at that time the boiler had been put in fit condition. Leaks and defects developing thereafter, not having been guaranteed against, furnish no excuse for the refusal to pay for the work and material theretofore done.

Decree will be entered for libelant on the libel, and the cross-libel dismissed.

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Foley & Martin, of New York City (James A. Martin and George V. A. McCloskey, both of New York City, of counsel), for appellant.

Amos Van Etten, of Kingston, for appellee.

Before WARD, ROGERS, and MANTON, Circuit Judges.

PER CURIAM. This appeal involves pure questions of fact, and, as we are entirely satisfied with Judge Mack's conclusion, the decree is affirmed.

(258 Fed. 929)

KNIGHT SODA FOUNTAIN CO. v. WALRUS MFG. CO.

(Circuit Court of Appeals, Seventh Circuit. April 4, 1919.)

No. 2632.

1. PATENTS ⟹328—VALIDITY AND INFRINGEMENT—COMBINED JAR AND DIPPER.

The Faries patent, No. 779,271, for a jar and dipper for serving crushed fruit, etc., claim 3, *held* not infringed. Claims 4 and 5 *held* invalid for indefiniteness, in view of the prior art.

2. PATENTS ⟹165—MEASURE OF INVENTION—DEFINITENESS OF CLAIMS.

A patent is sustained, not for what the inventor may have done in effect, but for what is pointed out clearly and distinctly in his claims. As much as is not so claimed belongs to the public.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit in equity by the Walrus Manufacturing Company against the Knight Soda Fountain Company. Decree for complainant, and defendant appeals. Reversed.

Donald M. Carter, of Chicago, Ill., for appellant.

Harry Lea Dodson, of Chicago, Ill., and Zell G. Roe, of Des Moines, Iowa, for appellee.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

EVANS, Circuit Judge. The patent to Faries, No. 779,271, relates to a jar and dipper for serving crushed fruit, etc. Claims 3, 4, and 5, held valid and infringed, read as follows:

"3. The combination of a jar, a cover for the jar, a rod extending below the cover, a dipper on the lower end of the rod, with its dipping edge extended away therefrom, and a handle above the cover, rigidly connected with the rod and shaped to aid in lifting the dipper in a proper filling and emptying position.

"4. The combination of a jar having a wide mouth, a cover for the mouth of the jar, a rod attached to the cover and extended downward therefrom, and a dipper on the lower end of the rod, inclined to the rod at such an angle that, when the rod is against a side of the mouth of the jar, the dipper may be made to assume an approximately horizontal position.

"5. The combination of a jar having a wide mouth, a cover for the mouth of the jar, a rod attached to the cover and extended obliquely downward

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therefrom, and a dipper on the lower end of the rod, inclined to the rod at such an angle that the dipper may be made to assume an approximately horizontal position inside the jar."

[1] Unquestionably the patent is very narrow. Only the precise form of construction described in each claim is protected. No wide range of mechanical equivalents can be indulged in. So construing the claims of the patent, we conclude that claim 3 is not infringed, because neither the last-named element, "and a handle above the cover rigidly connected with the rod and shaped to aid in lifting the dipper in a proper filling and emptying position," nor its mechanical equivalent, appears in the appellant's structures.

As to claims 4 and 5 an examination of the file wrapper is instructive. As first presented, patentee sought a patent covering, among other claims:

"The combination of a jar, a cover for the jar, a dipper adapted to be inserted into the jar, and a connection between the dipper and the cover."

Upon a division being ordered, and with several patent citations confronting him, applicant amended his specifications by inserting:

"One object of the invention is to provide a jar and dipper so shaped and proportioned that the dipping edge of the dipper may be presented downward to receive a filling of the contents of the jar, and the dipper may be raised in an approximately horizontal position by placing the back of the dipper rod against a side of the mouth of the jar."

And also:

"By making the bottom of the jar concave and shaping the ladle to conform in a general way to the concave surface, the entire contents of the jar may be readily removed."

Patentee struck from his specifications the language:

"One object of the invention is to provide a jar with a combined cover and dipper so disposed that the cover will always be on when the dipper is in," and

"Another object is to provide means for sustaining the jar in a vertical position, and still another object is to provide a readily attachable label plate to designate the contents of the jar."

Claims covering generally the combination of the jar, the cover, and the dipper, with the latter two connected, were withdrawn after the broadest claim heretofore quoted was rejected.

Novelty, if any exists in claim 4, resides in the combination by virtue of the last clause of the claim describing the angle formed by the attachment of the dipper to the lower end of the rod. In view of the use of the word "oblique" in claim 5, the word "downward" in claim 4 may well be construed as meaning perpendicular to the cover. It seems to us that the element, "and a dipper on the end of the rod inclined to the rod at such an angle that when the rod is against a side of the mouth of the jar the dipper may be made to assume an approximately horizontal position," is so indefinite and vague as to necessitate rejection of this claim.

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[2] A patent is the creature of the statute. The terms and conditions upon which the grant is made are fixed by the statute. Section 9432, Compiled Statutes 1918, requires the inventor to set forth his claims in "such full, clear, concise, and exact terms as to enable any person skilled in the art * * * to make, construct, compound, and use the same." What is not claimed distinctly in the invention, the public possesses. A patent is sustained, not for what the inventor may have done in effect, but what is pointed out clearly and distinctly in his open letter. White v. Dunbar, 119 U. S. 47, 51, 7 Sup. Ct. 72, 30 L. Ed. 303; McCarty v. Lehigh Valley R. Co., 160 U. S. 110, 116, 16 Sup. Ct. 240, 40 L. Ed. 358; Proudfit Looseleaf Co. v. Kalamazoo Looseleaf Binder Co., 230 Fed. 120, 140, 144 C. C. A. 418; Houser v. Starr, 203 Fed. 264, 267, 121 C. C. A. 462; National Cash Register Co. v. Gratigny, 213 Fed. 463, 467, 130 C. C. A. 109; Harder et al. v. United States Piling Co., 160 Fed. 463, 466, 87 C. C. A. 447; Avery & Sons v. J. I. Case Plow Works, 148 Fed. 214, 218, 78 C. C. A. 110.

While we may give liberal construction to the language used to protect the inventor, we cannot rewrite the claim, or insert an element or modify an element in the combination upon which alone validity depends. Words that describe a result may, of course, be adjective in character, that is, modifying in meaning, yet they must be definite and understandable. In this claim the words last quoted describe an angle formed by the rod and the dipper. Just what angle may not necessarily be defined, provided it is ascertainable by placing the rod against the mouth of the jar and the dipper assume a horizontal position. Unfortunately for claims 4 and 5, almost any angle will meet this test, especially if the mouth of the jar be made wide enough and the position of the dipper at the bottom of the jar be changed.

Had applicant included in the combination a jar with a concave bottom, and the dipper so attached to the lower end of the rod that it would fit in the concave bottom of the jar (such as was contemplated by the amended specifications), and the other elements appeared, a different question would have been presented.

In claim 5 the rod extends obliquely downward and the dipper on the lower end of the rod is inclined at such an angle that it may be made to assume an approximately horizontal position inside the jar. Here again the angle formed by the attachment of the dipper to the rod may vary widely and the described results still be obtained, provided the mouth of the jar be relatively large or the operator change the position of the dipper.

Nor can we ignore the prior art, even though no exact anticipation appears therein. Wettstein, in his patent, No. 356,514, covered a combination quite similar in purpose and in construction. In his specifications he says:

"My invention relates to a device for measuring and conveying liquids and small loose solid substances from one bowl or receptacle into another in an easy manner, and to provide a suitable covering for the same where required—such as cream or milk pitchers, sugar bowls, or other receptacles containing liquid or solid food—the object being to exclude impurities and also flies and

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other insects and vermin therefrom; another object of the device being that it is so constructed that, when the spoon or scoop is replaced into its proper receptacle, the cover is placed thereon at the same time, where said scoop is used in combination with the cover."

White secured a patent covering caps and spoons for mustard bottles. His top and his spoon were attached. Necessarily the dipper and the rod constituting the spoon formed an angle, and whether the dipper was "approximately horizontal" would depend upon the position of the rod at its place of connection with the top. Likewise the width of the mouth of the container necessarily determined to a certain degree whether the dipper would assume a horizontal position.

As the pre-empted field excluded patentee from the claims by him first made, and later withdrawn after rejection by the Patent Office, and as his advance, as set forth in his claims, is represented by the use of jars with a wide mouth (the indefinite and uncertain angle formed by the attachment of the rod and the dipper adding nothing), we must hold claims 4 and 5 invalid.

The decree is reversed, with costs, with directions to dismiss the bill.

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(259 Fed. 61)

LAKEWOOD ENGINEERING CO. v. NEW YORK CENT. R. CO.

(Circuit Court of Appeals, Sixth Circuit. February 5, 1919.)

No. 3201.

1. CARRIERS ⟹189—RATES—RIGHT OF SHIPPER.
A shipper of goods has the right to refrain from assembling its ultimate product, or to disassemble the same, for shipment in any way that will make the shipment take a lower traffic rate than if the articles were in final form.

2. CARRIERS ⟹189—RATES—"PORTABLE RAILWAY TRACK SET UP IN SECTIONS."
Though a manufacturer of portable railway track did not attach to the rails the plates and bolts, although the sections consisted of two steel rails and steel cross-ties, which were riveted together, *held*, that the article was a "portable railway track set up in sections," within the tariff providing for that class of articles, and shipper was not entitled to commodity tariff on iron and steel rails and cross-ties.

3. CARRIERS ⟹192—RATES—CONTRACT.
Though shipper billed and carrier transported its articles under a particular tariff for a considerable time, notwithstanding articles fell within another duly published tariff, *held*, that the rule that practical construction of the contract of both parties will govern does not apply, so as to defeat the carrier's action for the difference between the rate charged and that which should have been exacted; parties having no power to vary a published tariff, even by express contract.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Ohio; D. C. Westenhaver, Judge.

Action by the New York Central Railroad Company against the Lakewood Engineering Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

The plaintiff in error contracted with the French government to manufacture and sell a quantity of portable railway track, and, in executing the contract, had occasion to ship large quantities of this material over the road of the defendant in error, to New York, for export. The track was manufactured and shipped in sections. Each section, in order to satisfy the contract, would consist of two steel rails in parallel position, steel cross-ties riveted at each end thereof to the rails and fish plates, with the necessary bolts for attaching the ends of the rails to the ends of those of the adjacent section. There was in force a classification which, among an infinite variety of items, contained the following: "Tracks, portable railway, set up in sections (carload minimum weight 36,000 pounds); less than carloads, third class; carloads, fifth class." The classification also contained this rule: "When articles which are not specifically provided for * * * are offered for transportation, agents may bill same at the ratings provided for analogous articles, notation to that effect to be made on waybills; and will at once report the facts to their general freight department, in order that specific classification may be provided for." There was also an express provision that "articles not enumerated will be classed with analogous articles." A tariff duly published provided a rate of 22.4 cents per 100 pounds for articles belonging to the fifth class. There was also in force a commodity tariff which contained the following item: "New iron and steel rails and iron and steel railroad cross-ties, for export only, in carloads; minimum weight 20 tons of 2,240 pounds." The rate fixed for this commodity was 10 cents per 100 pounds.

In the belief that it would gain certain rightful advantages thereby, the shipper did not completely assemble its sections in the manner above de-

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scribed. It did not attach to the rails the plates and bolts, but shipped these separately and paid the freight thereon under another special commodity tariff, which all parties agree was applicable to the plates and bolts thus moving by themselves. The remainder of the product, as above described and in sections of varying length, was thereafter continuously shipped in this imperfectly completed form. The first shipments were inspected by the representative of the railroad designated therefor, and were by him pronounced to be the article named in the commodity tariff, and to be entitled to shipment at the 10 cent rate. About 100 cars were billed and shipped accordingly, and the shipper paid to the railroad the freight thereon. The subject-matter then coming to the attention of another inspector, he thought the product in question ought to be shipped as fifth class and at the higher rate. The question was referred to a sort of appellate inspection board provided for that purpose by the associated railroads, and this board affirmed the opinion of the second inspector. Thereafter the shipper continued to bill its shipments as under the commodity tariff and to pay the freight therefor; the railroad changed the billing so as to show a shipment under the classification, accepted the payments made as being payments on account and rendered bills for the difference. This course of business continued for some time, but eventually the railroad refused to accept any further shipments without payment in full at the higher rate, and brought this suit for the balances which had accumulated after it had begun to insist that the higher rate was the lawful one.

The case came on for trial before a jury. During the progress of the trial, the District Judge reached the conclusion that, as matter of law, the railroad was entitled to recover, and directed a verdict accordingly. The shipper brings this writ of error.

Mark A. Copeland, of Cleveland, Ohio, for plaintiff in error.
S. H. West, of Cleveland, Ohio, for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge (after stating the facts as above). [1] Without doubt, the shipper had the full right to refrain from assembling its ultimate product or to disassemble the same for shipment in any way which would make the shipment take a lower tariff rate than if the article were in final form. In re Suspension of Western Classification No. 51, I. C. C. No. 9, 25 I. C. C. 444, 487. If, therefore, within the true meaning of these two tariffs considered together, the defendant's product, in the form in which it was shipped, was rightly billed under the commodity tariff, the shipper has paid in full all lawful charges and there could be no recovery.

We assume, for the purposes of this opinion, and without undertaking to decide whether the assumption should in some cases be limited or qualified, that if there were ambiguity as to the two tariffs, or if there were material uncertainty as to the proper trade definition of an article shipped, there would be an issue of fact, and the action of the court below would have been erroneous.

[2] We see no room to doubt that the article shipped was "portable railway track, set up in sections." This phrase must be defined with reference to the situation in which and the purpose for which it is employed. It is familiar experience that the same words, found in different surroundings, do not necessarily have the same meaning. The only claim that this article does not respond to this definition is

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based upon the fact that to furnish it would not be, or might not be, full compliance with the contract of purchase and sale which used the same definition. If a contract of sale were involved, the question would need attention; but we are not concerned with what the phrase would mean in another situation. We are only concerned with what it does mean in this railroad tariff. While the plates and bolts may be an essential part of a "ready to sell" section of a portable track, they are plainly but a mere incident or appurtenance to the substantial thing itself. For purposes of definition and classification, a steam engine does not cease to be such because the governor is omitted, nor would shoes be anything but shoes, if shipped without buttons or laces. These sections might have been provided with the bolts and plates, but one tie might have been left off, whereby the sections would not have been satisfactory for contract delivery until the missing tie had been supplied, but we think they would still be "sections of portable railway track"; and the same thought covers the deficiency which here existed.

Indeed, the shipper's contention is based, not so much on denying that this article was rightly denominated "portable railway track set up in sections," as upon the theory that it was also properly called "steel rails and ties," and hence that the shipper was entitled to the lower rate. In considering this contention, we must first observe that we are not called upon to make an absolute, but rather a distributive, definition. Neither the classification nor the commodity description can be fully apprehended without remembering that opposite it there stands another description, with which this is to be contrasted, and that the question is whether the article clearly belongs in either one of the two named classes. We must inquire, therefore, not whether these articles are, in any sense of the term, steel rails and ties, but whether they may be so considered in spite of the fact that they have an alternative and more accurate name.

It is first urged that the presence of the conjunctive "and" between "steel rails" and "steel ties," indicates that the two things were to be in association, that the phrase does not refer to rails or ties, and that, when rails and ties are permanently joined together, they constitute the precise and very thing referred to. We do not think so much force can be given to the choice of this single word. Sometimes the conjunctive is purposeful and effective to denote a particular meaning, but often the choice between disjunctive and conjunctive is casual and indifferently made. Even in the greatest strictness, the word "and" is not inappropriate to indicate that the specified rate is applied to ties and is applied to rails, in each case regardless of the presence or absence of the other. Marvel v. Merritt, 116 U. S. 11, 12, 6 Sup. Ct. 207, 29 L. Ed. 550.

It is next said that the shipper always has the choice whether to ship an article set up or knocked down, and that named articles do not necessarily lose their identity because they have been fastened together. This is true enough in many cases; the trouble here is that, by being fastened together to the extent and in the manner employed, they at once pass over into a more appropriate classification that is

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waiting to receive them. These rails and ties ceased to be merely rails and ties; they were the raw materials which had been fabricated into something else.

[3] The third contention on the part of the shipper is the only one which, to our minds, is seriously forceful. It is that the railroad and the shipper were the two parties to this contract, and that both of them for a considerable period of time adopted and carried out a construction whereby this freight was to be treated under the commodity tariff. The familiar rule of practical construction by the parties is appealed to. If the matter were wholly one of private contract, it may be that this interpretation by the parties would sufficiently raise an issue of fact. We do not undertake to say; but there is more here than a merely private contract. A duly published tariff, in many respects, approximates a statute. Parties have no power to vary it by their express contract, much less merely by those implications arising from their conduct. Severe penalties are provided for its infraction or for any differential treatment of different shippers; and it cannot be permitted that the conduct of the railroad, by different agents at different times, should cause a tariff to mean one thing for one shipper and a different thing for another. We have no occasion to deny that there may be cases of ambiguity where a general or universal course of conduct may support one or the other construction; but in this case we think it the duty of the court to ascertain and declare the true respective meanings of these two tariffs as applied to the article here shipped, and we think the court below right in its disposition of the matter.

This conclusion makes it unnecessary to consider in detail the errors assigned as to admission or rejection of evidence; these all become merely incidental to the main question.

The judgment is affirmed.

(259 Fed. 64)

DETROIT UNITED RY. v. WEINTROBE.

(Circuit Court of Appeals, Sixth Circuit. February 5, 1919.)

No. 3191.

1. RAILROADS ⟹350(28)—INJURIES AT CROSSING—CONTRIBUTORY NEGLIGENCE.
   Where drivers approached double-track interurban railway, and, though warning bell at crossing for south-bound cars was ringing, and a south-bound car was in sight, bell for north-bound cars was not ringing, so that drivers, thinking that the gestures of the motorman of the south-bound car, intended to warn them of a north-bound car, were meant as commands to cross quickly, did so, and were struck by the north-bound car, whether they were guilty of contributory negligence in having failed to look carefully for it was a jury question.

2. TRIAL ⟹251(8)—INSTRUCTION—SUPPORT BY PLEADINGS.
   In an action against an interurban railroad for deaths at its crossing, instruction *held* not erroneous as submitting the theory of last clear chance not pleaded.

3. APPEAL AND ERROR ⟹1050(1)—HARMLESS ERROR—EVIDENCE.
   In an action against a railroad for deaths at a crossing, any technical inadmissibility of records purporting to show the rate of earnings of one

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decedent where he had been employed *held* harmless to the railroad, decedent having been a young and able-bodied man without dispute, while the records only purported to show he had been earning 30 cents an hour.

4. DEATH ⚷1—PRESUMPTIONS—CONTINUANCE OF LIFE.
There is a presumption, when persons are proved to have been living, that the same state of things as to their life continues, at least for a relatively short space of time.

5. DEATH ⚷6—ACTION—BURDEN TO DISPROVE EXISTENCE OF BENEFICIARIES.
In an action for death, the burden is on defendant to show that decedent's wife and children in a foreign country swept over by advancing and retreating armies were dead at the time of suit.

6. TRIAL ⚷260(1)—INSTRUCTIONS—REPETITION.
Requests to charge, covered by the general charge so far as they were proper, were properly refused.

In Error to the District Court of the United States for the Southern Division of the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Action at law by Max Weintrobe, administrator of the estate of Ruben Gorwitz, against the Detroit United Railway. Judgment for plaintiff, and defendant brings error. Affirmed.

Benjamin S. Pagel, of Detroit, Mich., for plaintiff in error.
George E. Brand, of Detroit, Mich., for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge. Ruben Gorwitz and Ben Kuidd were driving a fruit peddler's wagon easterly on Ten Mile road, and were about to cross the double north and south bound tracks of the interurban railroad, as they lay along the extension of Woodward avenue, several miles north of Detroit. About 500 feet north of the Ten Mile road crossing, the railroad tracks, curving northeastwardly, leave Woodward avenue and follow Washington street, in the edge of the village of Royal Oak. To the south, as these men came close to the tracks, there was a view for 1,250 feet. Kuidd's brother, Abe Kuidd, walked ahead of them across the tracks and signaled them to come on. As they approached the tracks, their attention was drawn to a south-bound car which came around the curve from Washington street. With this car there was apparent danger of collision; but the motorman began to slow down, signaled with his hand to the wagon drivers, and repeatedly sounded his alarm whistle. He intended thereby to warn them against the approaching north-bound car; but, taking it as a notice to hurry across out of the way, the drivers did so, and, entering upon the second track, were struck by the north-bound car. Both were killed. The administrator of Gorwitz brought this suit, and recovered the judgment against which this writ of error is prosecuted.

A review of the record convinces us that there was evidence tending to show negligence on the part of the defendant, and that the jury had some sufficient basis for concluding that the north-bound car

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was running at a dangerously excessive speed, and that it did not give those warnings of its approach which due care required. A recital of details leading to this conclusion would serve no useful purpose.

[1] The circumstances go far to indicate contributory negligence by the wagon drivers. As against the presumption that they took some precautions as to the north-bound car before they began crossing, and as against the claim that Abe Kuidd, walking ahead, looked to the south at the proper time for looking and saw no car, is the physical fact that the car must have been in plain sight of any one who looked to the south just before they drove upon the north-bound track. Whether the necessary effect of the conceded physical facts would be to demonstrate contributory negligence, except for the considerations about to be mentioned, we think it unnecessary to decide, because there are additional circumstances which made the question clearly one for the jury—accepting the evidence, as we must, in the light most favorable to plaintiff. At this point the railroad maintained automatic electric warning bells, so installed and arranged that they would begin to ring when an approaching car was 1,000 feet away and continue to ring until the car was past. In the apparent purpose to make one bell serve both for the Washington avenue curve and for the Ten Mile road corner, the installation was between these two points. There was a separate bell for each track. The bell which gave warning of a north-bound car approaching was upon a post about 200 feet north of the Ten Mile road crossing, while the one operated by the south-bound car was about 150 feet further and north of the beginning of the Washington avenue curve. The north-bound bell was out of order. It had been in this condition long enough to charge the railroad company with notice thereof. At the time of and just before this accident, the south-bound bell was ringing and the north-bound bell was not. If, then, the case may be considered with reference to the north-bound bell alone, it presents a situation where a warning bell, provided and customarily operated by the railroad company, is silent as the traveler approaches the crossing; and its silence is therefore an indication that no train is approaching, and in the nature of an invitation to cross; and this situation operates, as does an open gate or an absent flagman, to minimize the otherwise more imperative duty of looking and listening, and to make the issue of contributory negligence one of disputable inference. We have applied this rule with reference to gates and flagmen, we see no reason why it does not apply to warning bells, and it has been so held. Erie R. R. Co. v. Weber (C. C. A. 6) 207 Fed. 293, 296, 125 C. C. A. 37; Zimmerman v. Pennsylvania Co. (C. C. A. 6) 252 Fed. 571, 572, 164 C. C. A. 487; Tobias v. Mich. Cent. Co., 103 Mich. 330, 61 N. W. 514.

The result to be otherwise reached is not changed by the fact that there were two bells here and that one of them was ringing. It may be conceded that if it had not been for the approaching south-bound car, apparently explaining and satisfying the warning given by the ringing bell, the fact that it was sounding would have required the drivers to look carefully in both directions. It may even be con-

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ceded that if they had been strangers to the situation, the sound of a warning bell would have made it their duty to find out what it meant; but these concessions will not necessarily cover the case. These men had made this crossing three times a week every week for a considerable time, and it was entirely permissible for the jury to infer that they were familiar with the respective situations of the two bells, knew what each was for, and knew and realized that the north-bound bell was not ringing. When, to the effect of what was indicated by the silent bell, we add the concentration of their attention to the north and the distraction of their attention from the south, naturally caused by the well-meant, but unfortunate, alarm whistles from the south-bound car, we are well satisfied that the jury had the right to find the drivers free from contributing fault, in spite of their failure to look to the south, after looking would have shown them the coming car, and before it was too late.

[2] By an offer of amendment to the declaration, plaintiff undertook to allege negligence by the motorman, in that, after he had seen the drivers in a place of danger, or should have seen them, he did not use reasonable effort to stop. This was treated as an effort to rely upon the doctrine of the "last clear chance," and the motion to amend was refused. Defendant insists that, in spite of this refusal, the court submitted this theory to the jury and that recovery may be based upon this theory. We do not so interpret the charge. We think the charge in question clearly refers to that negligence which was alleged in the declaration, and which consisted in failing to keep a reasonably prudent lookout, so as to give the necessary warning and take the necessary precautions, if any one did come into the danger zone.

[3] The court received in evidence certain records purporting to show Gorwitz's rate of earnings where he was employed. Error is assigned because these records were not properly proved. Whatever their technical admissibility might be, there was no prejudice. Gorwitz was, without dispute, a young and able-bodied man, and these records only purported to show that he had been earning 30 cents per hour. This was in 1914. There could be no substantial harm from such proof.

[4, 5] Testimony was received as to Gorwitz's wife and children. The witnesses had known them in Russia, where they had remained when Gorwitz came to this country. No one had heard of them or from them for a considerable time—perhaps two years. The country where they had been living had been swept over by the advancing and retreating Russian and German armies more than once. In this situation, it was suggested that there was no sufficient evidence of the existence of a wife and children to justify a verdict for their benefit. We think this position not tenable. When persons are proved to have been living, there is a presumption that the same state of things, as to their life, continues at least for the short space of time here involved. It is more than possible that they were all dead before the time of the trial; but the burden was upon the defendant to show this. Chamberlayne on Evidence, § 1042.

[8] The requests to charge which were not given were covered

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by the general charge, so far as they were proper, well enough so that we can find no error in their refusal. Other questions presented, of evidence or of instructions, we have examined, but think they do not require comment.

The judgment must be affirmed.

(259 Fed. 68)

DETROIT UNITED RY. v. WEINTROBE.

(Circuit Court of Appeals, Sixth Circuit. February 13, 1919.)

No. 3190.

1. DEATH ⟹10, 16—DEATH BY WRONGFUL ACT—CAUSE OF ACTION—SURVIVAL AND DEATH ACTS.

Rights of action under Michigan "survival act," where the person injured survives the injury for an appreciable time, and under the "death act," where death is instantaneous, are separate and distinct, and may not exist at the same time.

2. ACTION ⟹40—DEATH BY WRONGFUL ACT—JOINDER OF CAUSES OF ACTION.

In Michigan, it is permissible to join in one declaration a count under the "survival act," on the theory that the person whose death is sued for survived his injuries an appreciable time, and one under the "death act," on the theory that the injury caused immediate death, though the two theories are inconsistent.

3. APPEAL AND ERROR ⟹264, 719(8)—QUESTIONS REVIEWABLE—ABSENCE OF EXCEPTION OR ASSIGNMENT.

In an action for death in Michigan, if there was a mistrial, in that, the verdict being general, there is no showing on which of two inconsistent theories plaintiff's recovery rested, whether on the theory of recovery under the survival or under the death act, it calls for no action by the Circuit Court of Appeals, in the absence of exception or assignment directed to the point.

4. COURTS ⟹366(29)—FEDERAL COURT—APPLICATION OF STATE RULE.

Where an action for death involves the application of the Michigan survival and death statutes, so far as the Michigan Supreme Court has established a rule as to when the action accrues under one statute rather than the other, the Circuit Court of Appeals should follow such rule, and not the decisions construing the federal statute.

5. DEATH ⟹103(1)—DEATH BY WRONGFUL ACT—SURVIVAL—QUESTIONS FOR JURY.

Where one injured breathed or gasped for breath while unconscious for about 15 minutes after the accident, whether there was a survival, so that the cause of action was under the Michigan survival act, or no survival, so that it was under the death act, *held* for the jury.

In Error to the District Court of the United States for the Southern Division of the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Action at law by Max Weintrobe, administrator of the estate of Ben Kuidd, deceased, against the Detroit United Railway. To review judgment for plaintiff, defendant brings error. Affirmed.

Benjamin S. Pagel, of Detroit, Mich., for plaintiff in error.

George E. Brand, of Detroit, Mich., for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

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DENISON, Circuit Judge. This case is, in all substantial respects, like No. 3191, Detroit United Ry. v. Weintrobe, Administrator of Gorwitz, 170 C. C. A. 132, 259 Fed. 64, decided February 5, 1919, and must be disposed of by the same considerations, with one exception:

[1] In Michigan, a cause of action which accrues to one who suffers a personal injury survives his death from that injury, and the measure of damages is the value of his life to his estate. Under what is known as the death act, an action for death caused by wrongful act accrues to the representative of the deceased for the benefit of those next of kin who were pecuniarily dependent. These rights of action are separate and distinct, and they may not both exist at the same time. Hence it has come to be the settled rule that where the deceased survives the injury for an appreciable time, so that a cause of action accrues to him, recovery is had and damages are measured under and pursuant to the survival act (Comp. St. Mich. 1897, § 10117); while, when death follows immediately upon the wrongful act, recovery is had and damages are measured pursuant to the death act (Comp. St. Mich. 1897, § 10427). Lincoln v. Detroit, etc., Co., 179 Mich. 189, 195, 146 N. W. 405, 51 L. R. A. (N. S.) 710; Jorgensen v. Grand Rapids, etc., Co., 189 Mich. 537, 541, 155 N. W. 535.

[2, 3] The declaration in the present case contained two counts—one upon the theory of the survival of the action which had accrued to the deceased; and the other upon the theory of an action which first accrued to his representative because of the death. The joinder of the alternative and inconsistent theories is permitted by the state practice. Ely v. Detroit Co., 162 Mich. 287, 291, 127 N. W. 259. Defendant requested an instruction that the undisputed evidence demonstrated that Kuidd did not survive the injury, and that hence, if plaintiff was entitled to recover at all, it could only be under the death act, and that the damages must be computed accordingly. The court refused this request and left it to the jury to assess damages under the one or the other act, according as they found that Kuidd did or did not survive the injury for "an appreciable time." No special finding was ordered or made, and there was a general verdict for plaintiff. Hence the record does not show upon which of the two inconsistent theories the recovery rests, nor to what beneficiaries the damages ultimately belong. However, if this is in so far a mistrial, it does not call for any action by this court, for the sufficient reason—if for no other—that there is neither exception nor assignment directed to that point.

The evidence shows that Kuidd was thrown agaist a telegraph pole, and then the body fell back upon the track, considerably crushed. The testimony of several witnesses for the defense, and of some for plaintiff, indicates that he was instantly killed in the most literal sense of those words; but the proofs must be taken most strongly for plaintiff. There was testimony tending to show that when people came running to Kuidd he was breathing, and that he continued to breathe, in the manner which was illustrated by a witness, and which

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all agreed was "gasping," for a period estimated as long as 15 minutes. He did not move or try to speak, or give any other sign of life. It is agreed that he was not conscious. Upon this state of facts was there room for the jury to find a survival?

[4, 5] The case did not arise in the administration of any federal statute, where it would be directly affected by the opinions of the Supreme Court in The Corsair, 145 U. S. 335, 348, 12 Sup. Ct. 949, 36 L. Ed. 727, and in St. Louis, etc., Co. v. Craft, 237 U. S. 648, 35 Sup. Ct. 704, 59 L. Ed. 1160; but it so involves the application of the two Michigan statutes already mentioned that, so far as the Michigan Supreme Court has established a rule as to when an action accrues under the one statute rather than under the other, we ought to follow that rule. The decisions of that court do not furnish any very satisfactory criterion. The case which on its facts is the closest one to the present is the latest, and is Lobenstein v. Whitehead Co., 179 Mich. 279, 146 N. W. 293. It was there held that signs of life, as persuasive and existing as long as in the present case, were not inconsistent with the conclusion that the man did not survive sufficiently to have a right of action accrue to him. This decision, however, directly holds only that under such circumstances there is an issue of fact which would justify the jury in finding no survival; and we cannot be sure that it was intended to go farther and lay down a rule of law applicable to these facts. In this state of the Michigan decisions, this court is not satisfied that there was error in submitting to the jury the question of Kuidd's survival.

It follows that the judgment must be affirmed.

(259 Fed. 70)

In re DIAMOND'S ESTATE.

Petition of FRANKENSTEIN.

(Circuit Court of Appeals, Sixth Circuit. January 7, 1919.)

No. 3173.

1. BANKRUPTCY ⟹20(2)—POWER OF COURT OVER STATE COURT RECEIVER.

   The federal bankruptcy court had power by summary order to compel the state court receiver of an insolvent partnership to turn over money in his possession to the bankruptcy court, to await its action on the question of compensation, fees, and disbursements of the receiver.

2. BANKRUPTCY ⟹101—CUSTODY OF PROPERTY.

   From the time petition in bankruptcy was filed the property of the bankrupt estate was constructively in the custody of the law.

3. BANKRUPTCY ⟹210—EXCLUSIVE JURISDICTION—ADJUDICATION OF DISTRICT COURT.

   On an adjudication of bankruptcy, the District Court acquired an essentially exclusive jurisdiction to administer the estate of the bankrupts generally, including the determination of liens on their property, as well as questions of disbursements and distribution generally.

4. BANKRUPTCY ⟹210—JURISDICTION OF COURT—PROPERTY IN CONSTRUCTIVE POSSESSION.

   The property which, by bankruptcy adjudication, became subject to the jurisdiction of the District Court to settle adverse claims included that in the court's constructive as well as in its actual possession.

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5. BANKRUPTCY ⚷152—TITLE OF TRUSTEE—RELATION BACK.
On an adjudication of bankruptcy, the trustee's title to the property and funds of the bankrupts related back to the time of filing the petition for bankruptcy adjudication.

6. BANKRUPTCY ⚷20(2)—EXCLUSIVE JURISDICTION OVER PROPERTY—SURRENDER—POWER OF STATE COURT.
The bankruptcy court, having made an adjudication, was not at liberty to surrender its exclusive jurisdiction over property of the bankrupt estate in its actual or constructive possession, and the state court, which had appointed a receiver for the estate, no longer had any power so to dispose of it as to deprive the bankruptcy court of power finally to determine the propriety of the disposition.

7. BANKRUPTCY ⚷20(2)—COMPENSATION AND ALLOWANCES OF STATE COURT RECEIVER—DETERMINATION BY BANKRUPTCY COURT.
The ultimate determination of the question of the compensation and allowances of a state court receiver *held*, under the facts, to rest with the federal bankruptcy court, which adjudicated that the firm involved was bankrupt, taking into consideration the extent to which the estate had been benefited.

8. BANKRUPTCY ⚷288(2)—JURISDICTION OVER STATE COURT RECEIVER—FUND ADVERSELY HELD.
If the state court receiver, when bankruptcy intervened, was holding a particular fund of the estate adversely to the bankrupts or their estate, jurisdiction was lacking in the federal bankruptcy court by summary proceedings to order the receiver to turn the fund over to the trustee in bankruptcy, but there was jurisdiction if the fund was not adversely held.

9. BANKRUPTCY ⚷288(3)—JURISDICTION OF BANKRUPTCY COURT—POSSESSION OF ASSIGNEE FOR CREDITORS—ADVERSE CHARACTER.
Possession of an assignee for the benefit of creditors is not adverse to the bankrupt or his estate.

10. BANKRUPTCY ⚷288(2)—JURISDICTION OF COURT—TRANSFER OF ASSETS BY STATE COURT RECEIVER—ADVERSE CHARACTER OF HOLDING.
A state court receiver of an insolvent partnership, when bankruptcy of the firm intervened, held its funds, not in his own right, but merely in an official capacity, and as a hand of the court, not adversely to the bankrupt or his estate, so as to deprive the bankruptcy court of jurisdiction by summary proceedings to order the fund turned over to the trustee.

11. BANKRUPTCY ⚷288(2)—JURISDICTION OF COURT TO ORDER TRANSFER OF FUNDS—ADVERSARY HOLDING BY STATE COURT RECEIVER.
That the state court receiver of an insolvent partnership disbursed a fund under the state court's order did not convert his holding, formerly non-adverse to the partners or their estate, into one of an adversary character depriving the federal bankruptcy court of jurisdiction by summary order to order him to transfer funds to the trustee in bankruptcy, where the receiver at the time knew of the bankruptcy proceedings, and of efforts of the bankruptcy court to prevent disbursement.

12. BANKRUPTCY ⚷296—ACTION BY RECEIVER IN STATE COURT—ELECTION OF REMEDIES.
A bankrupt's receiver, by going into the state court, which had appointed receiver for the insolvent estate, to ask the court to direct its receiver to turn over funds to the bankruptcy receiver, did not finally elect such remedy, submitting himself to the jurisdiction of the state court, and inviting its adverse order, so as to deprive the federal bankruptcy court of jurisdiction to order transfer of the fund by the state court receiver to the bankruptcy trustee.

13. BANKRUPTCY ⚷296—JURISDICTION OF COURT—PENDENCY OF APPEAL IN STATE COURT.
Pendency of proceedings in state appellate court for review of state court's action setting aside previous order for compensation of its re-

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ceiver *held* not to affect the jurisdiction of the federal bankruptcy court to make a summary order that the state court receiver transfer assets to the bankruptcy trustee.

Petition to Revise an Order of the District Court of the United States for the Western Division of the Southern District of Ohio; John E. Sater, Judge.

In the matter of the estate of Joseph Diamond and others, copartners doing business as the Eagle Suit & Skirt Company, bankrupts. On petition of Eli G. Frankenstein, receiver appointed by a state court, to revise an order directing him, as receiver of the bankrupts, to pay money to the trustee in bankruptcy. Order affirmed.

W. B. Mente, of Cincinnati, Ohio, for petitioner.
Walter A. De Camp, of Cincinnati, Ohio, for respondent.
Sidney G. Stricker, of Cincinnati, Ohio, and Saul S. Myers, of New York City, for Gera Mills and others, creditors.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. The order under review is one directing a state court receiver of the estate of the present bankrupts to pay certain moneys to the trustee in bankruptcy of that estate.

On September 17, 1917, the superior court of Cincinnati, in a partnership dissolution proceeding, instituted by one of the bankrupt partners, appointed petitioner receiver. Under intervening petitions for adjudication of bankruptcy, the first filed October 5, 1917, charging as acts of bankruptcy (a) the application by the debtors, while insolvent, for a receiver of all their property, and the appointment of such receiver because of such insolvency, and (b) a preferential payment (the original petition, filed October 4th, charging only the second act stated), the bankruptcy court on October 22d following appointed a receiver, with instructions to apply to the state court for an order directing the receiver of that court to turn over all the debtor's assets to the bankruptcy receiver. The state court thereupon, on October 23d, ordered its receiver to make such complete delivery, excepting $1,175 then and there awarded by the state court to the receiver for his services, counsel fees, and other expenses. On October 29th, delivery, with the exception stated, was made, and on that date the superior court, on petitioner's application, directed its receiver to disburse the $1,175 in question; the receiver being thereupon discharged.

On the same date the bankruptcy court directed its receiver to request the superior court to set aside its orders of October 23d and October 29th. This request was complied with by the state court on November 21st, upon the ground that "the United States District Court in Bankruptcy has found that it had exclusive jurisdiction in the premises, and that this court was without jurisdiction to enter same," and its former receiver was ordered to pay to the bankruptcy receiver the money in question. Meanwhile, on November 10th, bankruptcy adjudication was had, and on November 24th, on application of the bankruptcy receiver (apparently no trustee had then been appointed), the petitioner herein was ordered to show cause why he should not pay the money in question. After an extended hearing

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petitioner was ordered to make such payment to the trustee in bankruptcy; the question of the allowance to the receiver for his services and expenditures being expressly reserved for further hearing by the bankruptcy court, upon the filing of his account with appropriate application. Under the order of this court the fund in question has been paid to the trustee in bankruptcy, without prejudice to petitioner's rights. It seems to have been conceded below that the partnership was actually insolvent when the state receivership was applied for, although the receivership was neither ordered nor asked for on that ground.

[1-6] The broad question involved is whether the bankruptcy court had power, by summary order, to compel the state court receiver to turn over the money to the bankruptcy court, to await its action upon the question of compensation, fees, and disbursements of that receiver. We think this question must be answered in the affirmative. From the time the petition in bankruptcy was filed the property of the bankrupt estate was constructively in the custody of the law. Acme Co. v. Beekman Co., 222 U. S. 300, 32 Sup. Ct. 96, 56 L. Ed. 208. Upon the adjudication of bankruptcy, the District Court acquired jurisdiction essentially exclusive to administer the estate of the bankrupts generally, including the determination of claims to or liens upon their property, as well as questions of disbursement and distribution generally. In re Watts & Sachs, 190 U. S. 1, 27, 23 Sup. Ct. 718, 724 (47 L. Ed. 933);[1] U. S. Fidelity Co. v. Bray, 225 U. S. 205, 217, 32 Sup. Ct. 620, 56 L. Ed. 1055; In re Martin (C. C. A. 6) 193 Fed. 841, 846, 113 C. C. A. 627. The property so subject to its jurisdiction included that in its constructive as well as in its actual possession (Orinoco Co. v. Metzel [C. C. A. 6] 230 Fed. 40, 144 C. C. A. 338); and upon the adjudication of bankruptcy the trustee's title to the property and funds of the bankrupt related back to the time of filing the petition for bankruptcy adjudication (Everett v. Judson, 228 U. S. 474, 478, 33 Sup. Ct. 568, 57 L. Ed. 927, 46 L. R. A. (N. S.) 154; Bailey v. Baker Co., 239 U. S. 268, 275, 276, 36 Sup. Ct. 50, 60 L. Ed. 275; Toof v. Bank [C. C. A. 6] 206 Fed. 250, 251, 124 C. C. A. 118. This exclusive jurisdiction the bankruptcy court was not at liberty to surrender (Fidelity Co. v. Bray, supra, 225 U. S. at page 218, 32 Sup. Ct. 620, 56 L. Ed. 1055); and after bankruptcy supervened the state court (broadly speaking) no longer had power, unless under circumstances of emergency not applicable to the order here, to so dispose of the bankrupts' estate, in whole or in part, as to deprive the bankruptcy court of power to determine finally the propriety of such disposition.

[1] "The general rule as between courts of concurrent jurisdiction is that property already in the possession of the receiver of one court cannot rightfully be taken from him without the court's consent, by the receiver of another court appointed in a subsequent suit, but that rule can have only a qualified application where winding up proceedings are superseded by those in bankruptcy as to which the jurisdiction is not concurrent. Still it obtains as a rule of comity, and accordingly the receiver of the [bankruptcy court] brought his appointment to the knowledge of the [state court] and requested the delivery of the assets."

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[7] Assuming that the action of the state court in respect to allowances to its receiver was presumptively correct and just, and that the bankruptcy court will give due weight to this presumption, yet the ultimate determination of that question must, under the facts of this case, rest with the court of bankruptcy, taking into account equitable considerations and the extent to which the bankrupt estate has been benefited by the services and disbursements of the state court receiver. In re Watts & Sachs, supra; In re Zier & Co. (C. C. A. 7) 142 Fed. 102, 103, 73 C. C. A. 326; Hume v. Myers (C. C. A. 4) 242 Fed. 827, 830, 831, 155 C. C. A. 415; In re Neuburger (C. C. A. 2) 240 Fed. 947, 153 C. C. A. 633. Any other rule would, pro tanto, take the ultimate distribution of the assets of the bankrupt estate out of the hands of the bankruptcy court. We have no occasion to consider what the effect would have been had the state court fixed its receiver's compensation and allowances for merely the 18 days prior to bankruptcy. No action thus limited was had or asked, and the superior court, as the court of appointment, has since surrendered any claim of control over the subject. As the case stands, orderly administration will be best effected by treating the entire period of service as a unit.

[8-10] As to the remedy: The question of ultimate importance is whether or not the petitioner, at the time bankruptcy intervened, was holding the fund in question adversely to the bankrupts or their estate. If so, jurisdiction by summary proceeding was lacking. Louisville Trust Co. v. Comingor, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413. On the other hand, there was jurisdiction to compel the surrender of the fund, if not so adversely held. Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405. It is well settled that the possession of an assignee for the benefit of creditors is not adverse to the bankrupt or his estate. Bryan v. Bernheimer, 181 U. S. 188, 192, 193, 21 Sup. Ct. 557, 45 L. Ed. 814; Mueller v. Nugent, supra, 184 U. S. at page 70, 22 Sup. Ct. 269, 46 L. Ed. 405; In re Stewart (C. C, A. 6) 179 Fed. 222, 225, 102 C. C. A. 348; In re Neuburger, supra. In such case it is held that the adjudication in bankruptcy automatically and of its own force avoids the assignment and terminates the right of possession by the assignee. While the possession of the state court's receiver differed in some respects from that of an assignee for the benefit of creditors, in that the latter holds merely as an agent or representative of the bankrupt himself, yet we think the difference not conclusive. When bankruptcy intervened, the receiver was holding not in his own right, but merely in an official capacity and as the hand of the court, and not, we think, adversely to the bankrupts or their estate, within the meaning of the law. In re Watts & Sachs, supra, 190 U. S. at page 27, 23 Sup. Ct. 718, 47 L. Ed. 933; Hooks v. Aldridge (C. C. A. 5) 145 Fed. 865, 76 C. C. A. 409; In re Hecox (C. C. A. 8) 164 Fed. 823, 90 C. C. A. 627. Had the state court made before bankruptcy an order for compensation, and had disbursement thereunder been made before the commencement of bankruptcy proceedings (as was the case in Louisville Trust Co. v. Comingor, supra), the situation would have been different.

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[11] The fact that petitioner disbursed the $1,175 fund under the state court's order of October 29th did not convert a formerly non-adverse holding into one of an adversary character; for he then knew of the bankruptcy proceedings and of the efforts of the bankruptcy court then and there being made to prevent such action. Bryan v. Bernheimer, supra, 181 U. S. at pages 191 and 193, 21 Sup. Ct. 557, 45 L. Ed. 814.

[12] The proposition that the bankruptcy court had no power to authorize its receiver (as distinguished from a trustee) to take possession of the fund is answered by what is said in Bryan v. Bernheimer, supra, 181 U. S. at page 195, 21 Sup. Ct. 557, 45 L. Ed. 814, and in Lazarus v. Prentice, 234 U. S. 263, 266, 34 Sup. Ct. 851, 58 L. Ed. 1305. We see no merit in the proposition that the bankruptcy receiver, by going into the state court (as was highly proper in the observance of due comity) to ask that court to direct its receiver to turn over the fund to the bankruptcy receiver, thereby elected that remedy, so submitting himself to the jurisdiction of the state court and inviting the order complained of. The course taken by the bankruptcy receiver was designed to prevent that very action.

[13] The pendency of proceedings in the state appellate court for review of the state court's action of November 21st, setting aside its previous order for compensation, is not and could not well be urged against the jurisdiction of the bankruptcy court. The commendable action of the state court last referred to terminated any conflict between the federal and state courts. The legality of that order and of its predecessors, as affecting the jurisdiction of the bankruptcy court, is one arising under the bankruptcy law, which it is our duty to decide.

The discussion in the opinion of the District Court respecting the professional conduct of certain counsel for the receiver has, in our opinion, no relation to the questions purely of law involved in the preliminary determination whether the state receiver should pay the fund to the trustee in bankruptcy, subject to later action upon the merits of the receiver's claim. We have accordingly not considered that subject, and must not be understood as expressing any opinion upon its merits.

The order of the District Court is affirmed.

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(259 Fed. 76)

BOARD OF ROAD COM'RS OF MONROE COUNTY, MICH., v. KEIL.

In re GARRIGAN BROS. CO.

(Circuit Court of Appeals, Sixth Circuit. May 6, 1919.)

No. 3235.

1. BANKRUPTCY ⟹455—APPEAL FROM ORDER ON TRUSTEE'S PETITION—LACK OF FINALITY.

No appeal lies from an order of the District Court in bankruptcy overruling objections to the court's jurisdiction of the parties to and the matter set forth in the petition of a trustee in bankruptcy, asking instructions to sue the board of county road commissioners, with which the bankrupt had contracted, for the recovery of damages for breach of the board's original contract with the trustee; such order not being final.

2. BANKRUPTCY ⟹443—PETITION TO REVISE—JURISDICTIONAL ORDER OF DISTRICT COURT.

Under Bankruptcy Act 1898, § 24b (Comp. St. § 9608), the Circuit Court of Appeals will entertain petition to revise order of District Court in bankruptcy, overruling objections to its jurisdiction of the parties to and the matter set forth in the petition of a trustee in bankruptcy for instructions to sue the board of county road commissioners, with which the bankrupt had contracted, for the recovery of damages for breach of the board's original contract with the trustee.

3. BANKRUPTCY ⟹101—JURISDICTION OF BANKRUPT'S PROPERTY.

Where, when the bankruptcy petition was filed, equipment was in possession of bankrupt company, either as owner or lessee, and all parties interested, including the board of road commissioners, with which the bankrupt had contracted, and on whose work the equipment was to be used, recognized the receiver was in possession and control of the equipment, the jurisdiction of the bankruptcy court attached to the equipment, though it was not situated within the district where the proceedings were begun, and the jurisdiction of other courts, not exercised to ripen into actual holding adverse to the bankrupt, was superseded.

4. BANKRUPTCY ⟹293(1)—JURISDICTION OF COURT OVER PROPERTY—AGREEMENT OF CONTRACTOR WITH BANKRUPT.

Where a board of road commissioners, for which the bankrupt company had been doing work, acquired from the receiver in bankruptcy possession and use of the bankrupt's equipment, which it would not otherwise have obtained without litigation, and agreed that, when the work was finished, the equipment should be returned to the bankruptcy court, and to deposit a cash fund as security against loss or damage, if the board refused to return the equipment after it became bound to do so, there was a loss or damage subject to be assessed by the bankruptcy court, implying both the right and power of the court to determine when the duty to return might exist.

5. BANKRUPTCY ⟹293(4)—JURISDICTION OF DISTRICT COURT—LIABILITY OF BANKRUPT'S CONTRACTOR.

District Court in bankruptcy *held* without jurisdiction of question of liability of a board of county road commissioners to the bankrupt company, which had been doing road work for the board, and the company's trustee in bankruptcy, under certain contracts whereby the board, of whose liability to the bankrupt under the original contract for the work the court had no jurisdiction, submitted to appear before the referee to make concessions to aid him in deciding whether or not to give the receiver certain instructions, or whether to leave the contract and the bankrupt company's property in the board's hands for completion of the work by it.

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Petition to Revise and Appeal from an Order of the District Court of the United States for the Northern District of Ohio; John M. Killits, Judge.

Petition by the Board of Road Commissioners of Monroe County, Mich., to revise, and appeal from, an order entered on petition of Edwin D. Keil, trustee in bankruptcy of Garrigan Bros. Company, bankrupt. Order directed to be set aside and modified, as indicated in the opinion.

Pursuant to the statutes of that state, there was in Monroe county, Mich., a "board of county road commissioners," charged with certain powers and duties in building highways. It made contracts with the Garrigan Bros. Company, an Ohio corporation, of Toledo, by which the company agreed to build certain miles of road, according to certain plans and specifications, for the total sum of $117,000. The contracts contained the common provision that, in case the company became in default, the board might have the possession and use of all the company's road-building machinery and material, for the purpose of enabling the board to complete the contract. On August 15, 1917, the board declared the company in default, and gave notice of intention to take over the company's equipment and material. At the same time, either the company or the Toledo bank, which claimed to have a mortgage thereon, began to remove the equipment. The board filed a bill in the chancery court of Monroe county, and obtained a preliminary injunction preventing such removal. This case was removed to the United States District Court, at Detroit, where it is still pending. On August 17th, the Toledo bank filed a bill in the last-named court, and obtained a restraining order preventing the board from using the mortgaged property. Three days later the board and the Toledo bank and the company entered into an agreement, in the form of a stipulation, entitled in and filed in both of the Detroit cases, whereby it was agreed that the question of how much was due the company from the board should be arbitrated, and the sum due, if any, paid, and that, if the company did not go on with the work, the board might use the equipment, giving security for loss or damage, for which alone it would be liable. About a month later, upon its voluntary petition, the company was adjudged bankrupt by the United States District Court, at Toledo, and Edwin D. Keil was appointed, first receiver, and later trustee.

The question at once arose whether the receiver should assume and carry on and complete the contract with the board. He appears to have filed with the referee a petition for instructions in this respect, and notice was given to the board that this petition would be heard upon the day fixed. On that day, the board appeared before the referee "specially to object to any proceedings affecting the county roads in Monroe county, * * * excepting permission for the receiver to finish the said roads." The paper filed on behalf of the board further stated that it "did not consent that this court shall retain jurisdiction of any matters affecting said roads which any other court should have full and plenary jurisdiction to determine," and stated that the United States District Court, at Detroit, had such jurisdiction, and insisted that the question of the ownership of the equipment, and the right to its possession and use, the right to make or withhold payments or estimates, and the value of the work done by the company were all questions which, if not settled amicably, must be determined in the Detroit court. The parties then proceeded to negotiate a satisfactory arrangement in order to avoid litigation, and reached the conclusion that the bankrupt's estate and the trustee should not assume or undertake to perform the contract, but that performance should be completed by the board. The board was to employ Mr. Keil as superintendent; his employment was not as trustee, but in his personal capacity. It was further arranged that, in case Mr. Keil and his conduct of the work became unsatisfactory to the board, it might discharge him, in which case it would give 48 hours' time for the trustee to get authority from the bankruptcy court to assume and carry on the contract, lacking which, the board would proceed with the completion under the management of some

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one else. It was also agreed that the board should have the possession and use of the equipment until the work was finished, and that, upon completion, the board should pay to the trustee any unexpended balance of the contract price, and should surrender the possession of the equipment to the court; also that the sum of $25,000 should stand deposited by the board with the Monroe State Savings Bank, and be subject to the orders of the bankruptcy court, as security that the board would indemnify the trustee for any loss or damage to the equipment, excepting ordinary wear and tear. It was also agreed that the board and the trustee should file with the court monthly reports showing the progress of the work.

This agreement was reduced to form and entered by the referee as a proceeding before him. After reciting the various appearances for all the parties concerned, this entry proceeds: "After hearing from said parties, the following agreement and order is made." Then follow all the provisions agreed upon, the chief ones of which have been stated. The entry then concludes with the following: "It further appears that the board of county road commissioners have appeared here to object to the jurisdiction of this court upon any matters connected with its said rights, further than to determine whether or not this court will permit the said trustee to finish the said contracts in the place of said bankrupt, and this order is entered upon the understanding that the said board does not waive any of its objections heretofore filed in this matter. The said board does not consent to submit to the jurisdiction of this court the question of how much, if anything, may be owing to the said bankrupt by virtue of the road contracts referred to, and this order shall be without prejudice to any rights and claims the trustee may have against said board, or to claim that this court has jurisdiction to determine the same, the rights of the parties being in that respect the same as if this order had not been entered, and shall be without prejudice to the rights, claims, and liens of the National Bank of Commerce, and the jurisdiction of this court to determine the same."

Pursuant to this arrangement, work was continued by the board at least part of the time until August, 1918. The trustee then filed with the bankruptcy court his petition, reciting the contract of October 20, 1917, and alleging that the board had failed and neglected to carry on the work as therein contemplated. The petition seems to be upon the theory that the arrangement of October 20, 1917, was an original contract between the board and the trustee, and alleges that by reason of breaches of its contracts by the board before the bankruptcy, and further breaches by the board of the contract of October 20, 1917, "the bankrupt and petitioner have a large claim for damages against" the board. It asks that the trustee should be instructed "by this court to file a petition herein against said board for the recovery of damages." It also asks that the fund deposited in the Monroe County Bank "be now transferred to his direct control." It concludes:

"Wherefore petitioner prays for advice and instructions of the court in the premises, and that he may be relieved from further duty under said order of October 20, 1917, and that he may be directed to remove the equipment of the bankrupt to Lucas county, Ohio, and put the same in condition for sale, and that an order of sale of said equipment may be entered herein; that said Monroe State Savings Bank, of Monroe, Mich., may be ordered to turn over to your petitioner the aforesaid sum of $25,000, or place the same on deposit to the credit of your petitioner in some bank in Lucas county, Ohio; and that petitioner may be authorized to file his petition herein against said board of county road commissioners, seeking damages in the sum of $100,000; and petitioner further prays that a temporary restraining order may immediately issue, restraining the said board of county road commissioners, their attorneys, agents, employés, and all other persons, firms, and corporations which shall have notice thereof, from in any wise interfering with or preventing your petitioner from taking immediate and exclusive possession and control of all of said equipment and removing the same from its present location and preparing the same for sale."

Upon receiving notice of the proposed hearing of this petition, the board filed objections to the making of any order; the grounds of the objections being that the bankruptcy court had no personal jurisdiction over the board,

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which was and had been within the state of Michigan, and which could not be elsewhere sued without its consent, and also because all the property involved was under the jurisdiction and control of the court at Detroit. After hearing, the District Court overruled these objections, finding "that said objections to the jurisdiction of this court are not well taken, and that this court has jurisdiction over the parties and of the matters set forth in said receiver's [*sic*] petition." The board alleges that this order is erroneous, and seeks review by petition to revise; and it has also brought the same matter here on appeal.

Willis Baldwin, of Monroe, Mich., for petitioner and appellant.
Marshall & Fraser, of Toledo, Ohio, for respondent and appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judge.

DENISON, Circuit Judge (after stating the facts as above). [1, 2] We think it clear that the appeal must be dismissed. There has been no final order from which an appeal could be taken. Nor is any precedent pointed out for entertaining a petition to revise; but, with some hesitation, we conclude that the proceeding is of the character which the statute intends may be reviewed in that form. The petitioner asks instructions that he be directed to commence and prosecute certain litigation. It is objected that the court would have no jurisdiction thereof. The objection is overruled, and, if the order stands, the litigation will be undertaken. It would involve great delay and expense to the parties. Whether there is or is not jurisdiction is a question of law upon the face of the record. It would be most unfortunate to have such litigation prosecuted to the end, only to reach the eventual conclusion that it was all unavailing. We conclude that the order made below, and retaining jurisdiction in order to give such directions to the trustee, is one of those steps in administration which come within the scope of the petition to revise in matter of law provided by Act July 1, 1898, c. 541, § 24b, 30 Stat. 553 (Comp. St. § 9608). Gibbons v. Goldsmith (C. C. A. 9) 222 Fed. 826, 828, 138 C. C. A. 252. The statute contains no express limitation to "proceedings" which are final; but we do not intend to hold that we would entertain such a petition in all cases where there had been merely a preliminary declaration of jurisdiction below. The result which we later reach in this case makes such review now advisable. See In re Chotiner (C. C. A. 3) 218 Fed. 813, 134 C. C. A. 501.

[3] The dispute includes two main subjects, and these are separable, or, at least, are capable of separate treatment. One subject is the right to the possession and use of the equipment. The claim of the board is that it was and is entitled to treat this equipment as the property of the company, pledged to the board by the contracts. It is the claim of the bank and of the company that the equipment is the property of a partnership, distinct from the company, and that the company was using it only by permission of the owner. However this may be, we must infer from this record that, when the bankruptcy petition was filed, the equipment was in the possession of the company, either as owner or as lessee, and that, on October 20, 1917, all parties, including the board, recognized that the receiver was in actual possession and

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control, unless and except so far as that control was modified by the injunction which had been issued by the Monroe county chancery court. It is clear that the jurisdiction of the bankruptcy court attached at once to property thus possessed by or for the bankrupt, and in spite of the fact that it was not situated within the district where the bankruptcy proceedings were begun, and that the jurisdiction of other courts, which had not been so exercised as to ripen into an actual holding of the property adverse to the bankrupt, was superseded (Babbitt v. Dutcher, 216 U. S. 102, 109, 30 Sup. Ct. 372, 54 L. Ed. 402, 17 Ann. Cas. 969; Fidelity Co. v. Bray, 225 U. S. 205, 225, 32 Sup. Ct. 620, 56 L. Ed. 1055; In re Martin (C. C. A. 6) 193 Fed. 841, 846, 113 C. C. A. 627; Orinoco Co. v. Metzel (C. C. A. 6) 230 Fed. 40, 46, 148 C. C. A. 338; In re Diamond (C. C. A. 6) 259 Fed. 70, 170 C. C. A. 138 (January 7, 1919). It follows that the filing of this bankruptcy petition and the appointment of a receiver, by an order vesting in him the right to the possession of all the property of the bankrupt. and which expressly directed him to take the custody of all the equipment in question which was in use by the bankrupt in connection with its contracts in Monroe county, gave to the bankruptcy court exclusive jurisdiction to determine the right of the board or any other adverse claimant who should seek to obtain possession of the same equipment. It is not necessary to consider the rights of the Toledo bank, which claimed an adverse possession taken before the filing of the bankruptcy petition, because that bank is fully acquiescing in the jurisdiction of the bankruptcy court.

[4] It further appears that, by this order and agreement of October 20, 1917, the board acquired from the receiver and the bankruptcy court that possession and use of the equipment which it could not otherwise have obtained without litigation. It agreed that, when the whole construction was finished, the equipment should be returned by it to the bankruptcy court. It also agreed that, before it should be entitled to receive the equipment, it should deposit a fund in cash as security against loss or damage to the equipment, and that this fund should be subject to the orders of the bankruptcy court. If the board refused to return the equipment after it became legally bound to do so, there would seem to be a loss or damage subject to be assessed by the bankruptcy court under this provision, and this implies both the right and power of that court to determine when the duty to return might exist. If there were doubt about the original jurisdiction on this subject—although we do not mean to imply that there is—it would be removed by the appearance and participation of the board in this agreement and order of October 20. It results that, in so far as the trustee's petition of August, 1918, sought an order for the return of the equipment or an assessment of damages under the terms of the deposit for security, it presented a matter within the jurisdiction of the court, and that there was no error in proceeding to consider the merits of such application.

[5] The other subject-matter in dispute is the liability of the board to the company and the trustee under the contracts. The board being a resident of Michigan, and the District Court for the Northern Dis-

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trict of Ohio not being a court which would have had jurisdiction of an action by the company against the board, and the proposed proceeding not being one to set aside a preference or to recover property fraudulently conveyed, it is clear that the bankruptcy court would have no right to entertain the proposed proceeding against the board, unless the board had lost its right to object. See section 23b, Bankruptcy Act (Comp. St. § 9607). In the arguments here and in the opinion of the trial court such loss or waiver is predicated chiefly upon the order or agreement of October 20, 1917, and the effect of this order in this particular is the vital question.

It is said that an appearance for the purpose of testing jurisdiction over the subject-matter is a waiver of any lack of personal jurisdiction, and that the board, by its appearance at this time before the referee, has subjected itself to this result. It may be assumed that, after an appearance for the purpose of contesting jurisdiction over the subject-matter, just as it is after an appearance to contest the general merits, it is too late to deny any personal privilege of choice of forum: but the rule does not apply here. Although the paper filed with the referee purported to challenge the jurisdiction of the court on the subject-matter named, this challenge must be interpreted with reference to the facts. The District Court for the Northern District of Ohio could hear and decide such a controversy, if the board were properly served within the district; as a court of bankruptcy, circumstances could arise which would give it jurisdiction; the challenge, therefore, whatever its form, was, in the end, a claim that jurisdiction could not be exercised against the consent of the board, and was accompanied by an express refusal to consent beyond a stated limit. Indeed, whether a quasi municipal corporation could consent to be sued in a foreign state is a question which challenges attention. At least, its consent must be clear. The board did not join in submitting to the court any matter of the power of the court to hear the question of liability against it under the contract, nor did it ask or receive the opinion of the court thereon. Its substantial attitude as to the matter was:

> "Prior to the bankruptcy, there was a dispute between the bankrupt and us as to our respective rights under the contract. This dispute has taken form in litigation in Michigan. We cannot be sued and we are unwilling to be sued anywhere else, but, as the bankruptcy court has jurisdiction to direct its receiver to assume and carry on the contract, we will attend before the referee, put the situation before him, and make some concessions to aid him in deciding whether or not to give such instructions, or whether to leave the contract and equipment in our hands for completion by us; but it shall be expressly understood that we do not submit ourselves to the jurisdiction of that court with reference to any claim against us for damages under the contract."

We do not know of any principle or precedent which would justify treating such a denial of jurisdiction and express refusal to be sued on that cause of action in this court as being, nevertheless, an admission of jurisdiction and a consent to be sued. It goes without saying that there was no intent on the part of the referee in bankruptcy to mislead the board, but for the trustee and the bankruptcy court to accept whatever benefit there was in the agreement in question, and

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then repudiate the condition upon which that benefit was procured, has the effect of misleading. Language could not be clearer than that employed in the disclaimer. It was expressly provided that, as to the substantial controversy whether anything, and, if so, how much, was owing by the board to the bankrupt, the jurisdiction of the bankruptcy court was denied, "the rights of the parties being the same in this respect as if this order had not been entered"; and we find nothing in any other part of the order inconsistent with this reservation.

The trial court was largely influenced in its conclusion by the thought that the board could not be heard to deny the jurisdiction of the court to enforce the very contract which the board had made with the court through its officer. Just how far the court may have personal jurisdiction over a nonresident to enforce a contract made with its receiver or trustee, which contract has been by both parties submitted to the court for approval, we need not decide. We do not find that the rights sought to be enforced and the wrongs sought to be redressed by the receiver (as to liability) had substantial basis in the contract of October, 1917. This contract made no vital change in the existing rights of the parties. There had already been a breach, and the party guilty thereof was liable to the other party in damages. After the effort to have the receiver assume and carry out the contract failed, the parties then made an arrangement, the sole purpose of which was to minimize the damages in the interest of whichever party might eventually be found liable. In place of the legal rules for determining damages under those circumstances, the parties substituted some voluntary arrangements. Indeed, it is doubtful whether they made any very substantial change in the obligations which the law would or might have imposed. Any breach of this later contract is wholly incidental to the underlying breach. We cannot conceive an assessment of damages for violating the contract of October 20 which would not be inextricably confused with the original liability and the original damages. To permit jurisdiction which might rest upon the enforcement of such an incidental contract to neutralize lack of jurisdiction as to the main underlying question, would be to merge the principal thing in the incidental.

It follows that the bankruptcy court is without jurisdiction to entertain the controversy as to how much is due from one party to the other for damages for breach either of the original contract or of the incidental one of October 20. We do not find this subject and that of the equipment so interdependent that power to hear and decide upon one necessarily includes the other.

The order under review should be set aside, and should be modified as indicated in this opinion. The petitioner will recover costs.

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(259 Fed. 83)

LINDLEY v. DENVER et al.

(Circuit Court of Appeals, Sixth Circuit. March 7, 1919.)

No. 3162.

1. CONTINUANCE ⟹7—DISCRETION.
The matter of granting a continuance to plaintiff, who was not ready when the case came on for trial, was discretionary with the District Court.

2. EQUITY ⟹359—RIGHT TO DISMISS WITHOUT PREJUDICE.
Where no claim has been made for cross-relief, plaintiff has an absolute right to dismiss his bill without prejudice at any time before the case is ripe for decision, if not later, and the expense incurred by defendant in preparing for trial, and the resulting delay, do not alone constitute good cause for refusing such dismissal.

3. COURTS ⟹332—CHANGE IN PRACTICE—ADOPTION OF NEW RULES—EFFECT.
The Supreme Court, in adopting new equity rules in 1912 (198 Fed. xix, 115 C. C. A. xix), and in thus declining longer to retain the English chancery practice of 1842 as a standard, did not intend to abolish the whole body of federal equity practice which had grown up under the old rule 90 and had become the accepted practice in the Supreme and all inferior courts; the old practice continuing, except as it was changed.

4. EQUITY ⟹359—RIGHT VOLUNTARILY TO DISMISS—CASE NOT RIPE FOR DECISION.
Case wherein plaintiff asked leave to dismiss the bill, without prejudice, which was denied, and the bill dismissed absolutely, *held* not within any exception to the rule of right to dismiss without prejudice concerning cases which are ripe for decision and where there is proof before the court to justify dismissal on the merits, so that it is too late for a voluntary dismissal without prejudice.

5. DESCENT AND DISTRIBUTION ⟹83—RESCISSION OF SETTLEMENT OF ESTATE—JURISDICTION TO DISPOSE OF EQUITIES—TENDER BACK OF CONSIDERATION.
In an equity suit for rescission of settlement of the estate of plaintiff's mother, the court in its final decree can properly marshal and dispose of any equities that might exist in connection with any duty on the part of plaintiff to tender the consideration back.

6. DESCENT AND DISTRIBUTION ⟹83—RESCISSION OF SETTLEMENT OF ESTATE—SUFFICIENCY OF BILL.
Bill by a daughter for rescission of a settlement of her mother's estate *held* not insufficient on its face, and subject to dismissal on motion for failure to allege any necessary tender back of consideration by the daughter to support the rescission, which, under defendants' answers, evidently would have been refused.

7. DESCENT AND DISTRIBUTION ⟹83—SETTLEMENT AMONG HEIRS—SUIT FOR RESCISSION—PLEADING.
In a daughter's suit to rescind a settlement of her mother's estate, bill and defendants' pleadings in opposition *held* to raise an issue of fact whether or not certain stock was or was not a part of the estate of plaintiff's mother, to a trial of which plaintiff was entitled, so that dismissal of the bill, after denial of plaintiff's motion for leave to dismiss voluntarily without prejudice, was erroneous.

8. EQUITY ⟹365—DISMISSAL ON MERITS—CLAIM OF BAD FAITH—REFUSAL TO ALLOW VOLUNTARY DISMISSAL.
Though the circumstances tended to persuade the trial court that plaintiff's suit for rescission of a settlement of her mother's estate was not prosecuted in good faith, but vexatiously, in the absence of issue upon or trial of the claim of bad faith, final dismissal of the bill on the merits

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cannot be supported on such ground; plaintiff having had prima facie an absolute right to dismiss without prejudice, as she asked leave.

9. APPEAL AND ERROR ⟹1178(1)—DIRECTION OF ORDER—EQUITY CASE.

On a writ of error, an appellate court will direct the entry of the order which should have been made by the trial court on the day when it entered the judgment under review; but on appeal in equity there is no such rigid rule, and the appellate court will direct the order which ought to be made as the situation exists after the mandate goes down.

10. EQUITY ⟹359—MOTION FOR VOLUNTARY DISMISSAL—DELAY OF DECISION TO PERMIT CROSS-CLAIM.

In view of the peculiar facts in a daughter's suit for rescission of settlement of her mother's estate, *held*, that the trial court would have been justified, if such course had appealed to its discretion, in delaying decision of plaintiff's motion for dismissal without prejudice until defendants might have had opportunity to make any cross-claim if they promptly exercised the privilege.

Appeal from the District Court of the United States for the Western Division of the Southern District of Ohio; Howard C. Hollister, Judge.

Suit in equity by Mary Louise Denver Lindley against Matthew Rombach Denver and others. From an order dismissing the bill, plaintiff appeals. Order vacated and set aside, and plaintiff's motion for leave to dismiss without prejudice directed to stand for hearing in due course and to be granted, etc.

Burton B. Tuttle, of Cincinnati, Ohio, and Charles E. McMahon, of New York City, for appellant.

A. E. Clevenger, of Cleveland, Ohio, and John Weld Peck, of Cincinnati, Ohio, for appellees.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge. When this equity case, which was at issue in the court below upon full pleadings, came on for trial in open court at the time fixed, Mrs. Lindley, the plaintiff, was not ready, and asked a continuance. The court denied this request. Plaintiff then asked leave to dismiss the bill without prejudice. This request was also denied, and an order was entered dismissing the bill absolutely and without qualification. The plaintiff appeals, and complains both of the refusal to give a continuance, and of the final order.

[1] The matter of continuance was discretionary, and there was ample ground upon which to base the action which the court took.

[2] It undoubtedly has been the settled rule of the federal courts in equity that, where no claim had been made for cross-relief, plaintiff had an absolute right to dismiss his bill without prejudice, at any time before the case was ripe for decision (if not even later), and that the expense incurred by defendant in preparing for trial and the resulting delay did not alone constitute good cause for refusing such dismissal. Pullman Co. v. Transportation Co., 171 U. S. 138, 145, 146, 18 Sup. Ct. 808, 43 L. Ed. 108; Detroit v. Detroit Ry. (C. C.) 55 Fed. 569, 572; Harding v. Corn Products Co. (C. C. A. 7) 168 Fed. 658, 664, 665, 94 C. C. A. 144, certiorari denied 214 U. S. 515, 29 Sup.

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Ct. 696, 53 L. Ed. 1063; The Bainbridge (C. C. A. 9) 199 Fed. 404, 406, 118 C. C. A. 88). It is conceded that the present case would fall within this rule, and that the action of the trial court would be erroneous, unless for the effect of some one of those special considerations which we proceed to discuss.

[3] The first is that the rule itself has grown up during the period while the federal courts of equity were governed by the practice in the High Court of Chancery, as it existed in 1842 (old rule 90), and that this arbitrary right of the plaintiff to dismiss the bill was an element of the English chancery practice existing at that time, while the new equity rules adopted in 1912 (198 Fed. xix, 115 C. C. A. xix), no longer provide any such dependence upon the old English practice It is therefore said that the rule in question falls because its foundation is gone, and that federal courts of equity should now follow either the later English practice, or what is said to be the inherently reasonable practice, and should make the right to dismiss without prejudice one which is discretionary with the trial court according to the facts of the particular case. We do not find ourselves able to accept this view. We do not think that the Supreme Court, in adopting the new rules in 1912, and in thus declining longer to retain the English chancery practice of 1842 as a standard, intended to abolish the whole body of federal equity practice which had grown up under the old rule 90, and had become the accepted practice in the Supreme and all inferior courts. It is more reasonable to think that the fixed and settled equity practice of the federal courts in this country was intended to continue as it was in 1912, save as it was changed by these new rules; and this is, in effect, the conclusion of the Circuit Court of Appeals of the Second Circuit in the only case which has been brought to our attention touching the subject. Individual Co. v. Union Co., 250 Fed. 625, 626, 162 C. C. A. 641.

[4] It is next said that the case was, in effect, ripe for decision, and that there was enough proof before the court to justify dismissal on the merits, and it was therefore too late for a voluntary dismissal without prejudice. Without undertaking to decide just when it may thus be too late, short of actual decision, we conclude that this case does not fall within any exception of this kind. Some depositions had been taken by plaintiff, and they were on file. The defendant had taken no proofs, unless the answers given by some of defendants to plaintiff's interrogatories can be considered as such proofs; and we find no justification for attributing that character to them.

[5, 6] It is next alleged that the bill was insufficient on its face and was subject to dismissal on motion, and hence that the action taken did not result in prejudice to plaintiff. The suggested grounds of insufficiency in the bill are two: First, that it did not allege the necessary tender to support the rescission; and, second, that it did not state facts to support the relief claimed.

The bill alleged that Mrs. Lindley, as heir of her mother, was entitled to a one-ninth share in her mother's estate; that her brother and sister, the other heirs, made a settlement with her and paid her a sum of money in full satisfaction for her share in the estate; that

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she later discovered that they had misled her as to the amount of the estate, and she filed a bill to set aside this settlement and obtain her rightful share; that the suit so commenced was compromised and settled and that her brother and sister paid her the additional sum of $15,000 in full satisfaction and discharge of all her claims to her mother's estate; that she later discovered that valuable assets had been omitted from the inventory of the estate furnished her to induce this second settlement, and she therefore filed this present bill (or what for this purpose, we call the present bill) to repudiate and rescind both the first and the second settlements and for the necessary accounting and complete payment of her true and full share. The bill did not allege that she had ever tendered to the defendants the return of the consideration which she had received upon these settlements and in connection with her demand for rescission; and this is said to be a fatal defect in the bill.

If we were considering the first bill, it would be clear enough that a tender of the consideration back was not a necessary preliminary. It would appear that plaintiff was entitled to what she had received, and there would be no reason for requiring that she should tender anything back. The suit in equity is for a rescission, not as upon a rescission; and the court can, in its final decree, properly marshal and dispose of any equities that might exist in that connection. Gould v. Cayuga Bank, 86 N. Y. 75; Thomas v. Beals, 154 Mass. 51, 27 N. E. 1004. We are not sure that this rule reaches the second settlement. As to that, defendants deny that she was entitled to anything. They say they paid her $15,000 for peace. It seems that the defendants might have been entitled to require a tender of this $15,000, with the bill at the latest, so that they might, if they wished, accept the tendered rescission of the second settlement contract, and so that both parties would fall back upon the position which they occupied when the first bill was filed; but defendants have cut themselves off from any substantial right to the benefit of this principle. In their answers in this present case, they have relied upon the second settlement as valid in all particulars, and they expressly insist that this second settlement should not be rescinded but should stand in full force and effect. It is therefore plain that if a tender had been made, they would have refused it; and the court surely cannot refuse to hear the plaintiff because she has failed to do a confessedly vain and useless thing.

[7] The bill first filed directed against the second settlement contained only vague and general allegations of fraud and concealment. We assume, without holding, that the bill was, for this reason, bad. The plaintiff undertook to amend by averring also the stock transaction hereafter mentioned; pending a motion thus to amend, dismissed the bill voluntarily; and, after a very short interval, filed a new bill which was substantially the same which she had sought to obtain by amendment. The question is, therefore, whether this new bill states, as to the stock transaction, a case which requires hearing. It is, in brief, that plaintiff's mother was a stockholder in the Clinton County National Bank; that this bank had taken over, on the

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foreclosure of collateral, some industrial stock which was of doubtful value, and which the Comptroller refused to permit the bank to carry in its assets; that the stock was turned over to plaintiff's mother, and she gave her note to the bank therefor; that this stock had become very valuable, and that it had been, by defendants, excluded from the mother's estate, upon the pretense that it really belonged to the bank. The defendants alleged, in pleading and in response to interrogatories, that the stock had always been the property of the bank; that it was transferred to plaintiff's mother only to protect her against liability on her note; that the note was paid very shortly out of dividends from the stock; that the stock was then reassigned by the mother to the bank; that it had been held alone by the bank without claim by her for many years before her death; and that it had never been a part of her estate. If the record permitted the court to assume the truth of the things thus alleged in answer, the case would have a different aspect, and we can not be very sure from the course taken on the argument that plaintiff's counsel have any intention of disputing the substantial truth of these allegations; but there is nothing on the record to justify the court below or this court in proceeding to make a final order based on the supposition that these allegations are admitted. Upon the pleadings, there is a sharp issue of act as to whether this stock was or was not a part of the estate of plaintiff's mother; and plaintiff seems to have been entitled to a trial on that issue.

[8] Finally, it is said that the conduct of the plaintiff had been so vexatious, and had so far evidenced an intent not to try her alleged rights, but to refrain from trying them, and to use a succession of suits as a means of extorting money, as to justify the court in making an order which would put an end to the matter. The history of this and previous litigation before the trial judge, and other facts which very likely were conceded in argument before him, as they were before us, do not leave this claim without color; but we are unable to think it justified the action taken. Defendant asked no cross-relief, and if final action in the subject-matter was to be taken, based either upon the theory that plaintiff's action was vexatious or upon the theory that equity, having been asked to vacate the settlement, would, on the contrary, approve and confirm it, plaintiff was entitled to an issue and a day in court thereon. When we are proceeding, as we do, upon the basis that the plaintiff had, prima facie, an absolute right to dismiss without prejudice, and that the allowance of such dismissal was not a discretionary matter in the absence of special justification, we are compelled to conclude that, however much the circumstances tended to persuade the trial court that plaintiff's action was not prosecuted in good faith, but where there had been no issue upon, or trial of, that claim of bad faith, a final dismissal of the bill cannot be supported upon that ground.

[9] These views make it necessary to set aside the final order of dismissal; but it is apparent that a question exists which is likely to bring the case back here immediately, and we think proper to indicate our views now. Upon a writ of error, an appellate court will

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direct the entry of that order which should have been made by the trial court on the day when it entered the judgment under review; upon an appeal in equity, there is no such hard and fast rule; the appellate court will direct the order which ought to be made as the situation exists after the mandate goes down; and this leads to the steps which may naturally be here anticipated.

[10] At any time before motion to dismiss was made, the defendants had the undoubted right to claim any appropriate cross-relief, and such claim would have prevented the dismissal until the cross-claim could be heard. Without undertaking to declare any rule beyond the facts of this case, we think that those peculiar facts would have justified the trial court, if such course had appealed to its discretion, in delaying a decision of the motion until the defendants might have had opportunity to make such cross-claim, if they wished to do so, and promptly exercised the privilege. Where litigation has a history like this, we would see no injustice, but, rather, the opposite, in permitting such a cross-claim, and in then proceeding in due course to hear and decide the complete merits of the controversy and to either vacate the settlement or affirm it and set the matter at rest. It is additionally clear that no prejudice can come to plaintiff from this course, if it is now pursued, since it will give her the very opportunity which she sought, to make further preparations and be ready for trial.

Our direction will therefore be that the order of dismissal be vacated and set aside, and that plaintiff's motion for leave to dismiss without prejudice stand for hearing in due course and be granted, unless the trial court shall, in its discretion, think proper to delay the hearing and disposition thereof until defendants have opportunity to claim cross-relief.

The appellant will recover the costs of this appeal.

(259 Fed. 88)

BAILEY v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. February 5, 1919.)

No. 3209.

INTERNAL REVENUE ⟹39, 40—SPECIAL TAX ON BUSINESS—"CARRYING ON BUSINESS OF RETAIL LIQUOR DEALER."

To subject a person to conviction for violation of Rev. St. § 3242 (Comp. St. § 5965), by "carrying on the business of a * * * retail liquor dealer" without having paid the special tax, a single sale is not sufficient, unless made under circumstances which warrant the inference by the jury that defendant either had liquor on hand, or was ready and able to procure it, for purposes of sale.

In Error to the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

Criminal prosecution by the United States against Mrs. William H. Bailey. Judgment of conviction, and defendant brings error. Reversed.

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Jere Horne, of Memphis, Tenn., for plaintiff in error.
Wm. D. Kyser, U. S. Atty., of Memphis, Tenn.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge. Mrs. Bailey was convicted of carrying on the business of a retail liquor dealer without having paid the special tax therefor, and in violation of R. S. § 3242 (U. S. Comp. St. 1916, § 5965). The government proved the sale of a drink and of a half pint to Bryant. Mrs. Bailey testified that Bryant was a personal acquaintance; that he came to her residence in the evening; that after a time he expressed need for whisky, and wanted her to let him have some; that she declined, saying she had none; that, after further urging from him, she told him she had a small quantity, less than a quart, which she had for personal or household use, and that she could not let him have from this quart the pint which he requested, but would let him have a half pint; that she did so, and that, although she declined to charge for it, he pressed payment upon her, which she finally accepted; and that this was the entire transaction. The court charged the jury that, even if her testimony were fully accepted and believed, nevertheless she would be guilty under the indictment, and the rightfulness of this charge is the question brought here for review.

The statute says:

"Every person who carries on the business of a * * * retail liquor dealer * * * without having paid the special tax as required by law, shall, for every such offense, be fined," etc.

Obviously, the "such offense" which is punished is to "carry on the business of a retail liquor dealer." This phrase would not seem to be difficult of definition, either from the standpoint of the words used or from that of the purpose of the law. There must not only be a "business," but it must be "carried on." The purpose of the law was to raise revenue by an occupation tax. Both these considerations imply that there must be something more than a single casual sale, disconnected from any habitual or intended practice. There cannot be a "business carried on," unless there is either an actual or intended adherence to that course of conduct which alone can constitute the adoption and practice of a business or occupation. Of course, it need not be the sole business or occupation, or even one of any comparative importance as relating to the other business or occupation of the same person; nor would it be necessary that any particular quantity of material should be kept on hand for sale for any particular length of time; but both the ability and the willingness to make sales from time to time, whenever appropriate conditions might arise, seem to us to be required, by the plain meaning of the words, in order to make out an offense against this statute.

Perhaps it is rightly to be assumed that no other construction would ever have been attributed to this section, save for the supposed effect of another section of the act. Revised Statutes, § 3244 (U. S. Comp. St. § 5971), fixes the amount of the tax to be paid. The fourth subdivision says:

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"Retail dealers in liquors shall pay $25. Every person who sells or offers for sale foreign or domestic distilled spirits or wines in less quantities than five wine gallons at the same time shall be regarded as a retail dealer in liquors."

From this it is argued that the more general language of section 3242 is defined and limited, and that therefore a single sale, inherently and necessarily and always, makes the seller a taxable retail liquor dealer. The language of section 3244 does not require this conclusion. "One who sells" is not necessarily synonymous with "one who makes a sale." Even where standing by itself, "one who sells" may well imply an habitual rather than an isolated act. It seems equivalent to "one who is selling"; but when this definitive phrase is considered in connection with the fact that it is found in the law taxing occupations and in relation to the tax which is imposed only upon carrying on business, and that the phrase serves the main, if not the only, purpose of distinguishing between different kinds of business—wholesale and retail—section 3244 seems to us to lend no substantial support to the thought that it is thereby made immaterial whether or not there is any "business carried on," in the ordinary and usual sense of these words.

It is further to be noted that the language of section 3244 is inappropriate for a single sale. It is "one who sells * * * in quantities less," etc. In strictness of language, this plainly refers to a plurality of transactions. One who makes only a single sale does not sell "in quantities." This distinction would be overnice as a substantial basis of interpretation; but it demonstrates that section 3244 does not imperatively and finally require that the language of section 3242 should have a forced and unreasonable construction.

Revised States, § 3244, seems to have been superseded by section 4 of the Act of March 1, 1879 (U. S. Comp. St. 1916, § 5973). The arrangement here found emphasizes the conclusion that the phrase "one who sells" was adopted, not to define what "carrying on business" means, but rather to distinguish between different kinds of business. It is repeated four times, always as incidental to the definition of a business; and in defining "dealers in malt liquors" it says that one who sells malt liquors, "but who does not deal in spirituous liquors," shall pay a lesser tax, thus again implying that the higher tax is to be paid by those who "deal in" spirituous liquors.

It is true that in the provisions of the law which relate to taxes on tobacco, as found in subsections 6, 7, 8, and 9 of R. S. § 3244, the tax-fixing provisions said that every person should be regarded as a retail dealer in tobacco "whose business it is to sell," and that the definition of a retail liquor dealer as "one who sells" and of a retail tobacco dealer as "one whose business it is to sell" carries a suggestion that the former definition is broader than the latter. We do not overlook this suggestion, but we cannot think it has sufficient force to overcome the other considerations involved. Further, this subsection 7, which referred to retail leaf tobacco dealers, has been superseded by section 35 of the Act of August 5, 1909 (U. S. Comp. St. § 6175), wherein it is said that "every person shall be regarded as a retail dealer in leaf tobacco whose business it is to sell leaf tobacco in quantity less, etc.;

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or who shall sell directly to consumers, etc.," thus illustrating that "who shall sell," like "one who sells," may rightly refer to a business and not to a single sale.

Again, we observe that by section 3242, "every such offense" draws separate punishment. If a single sale is not merely evidence of the offense, but is the offense itself, a single day of carrying on the business might support a great number of indictments, and such a result indicates an unreasonable construction. The preceding sections, 3232–3241 (Comp. St. § 5955 et seq.), also are all instructive to the effect that the thing taxed is not the sale, but the occupation.

The question has not been authoritatively decided. In Ledbetter v. United States, 170 U. S. 606, 610, 18 Sup. Ct. 774, 775 (42 L. Ed. 1162) speaking of this statute, the court says:

"The offense does not consist in selling or offering for sale to a particular person distilled spirits, etc., in less quantities than five gallons at one time, but in carrying this on as a business; in other words, in the defendant holding himself out to the public as selling or offering for sale, etc.. While it has been sometimes held that proof of selling to one person was, at least, prima facie evidence of criminality, the real offense consists in carrying on such business, and if only a single sale were proven it might be a good defense to show that such sale was exceptional, accidental or made under such circumstances as to indicate that it was not the business of the vendor. United States v. Jackson, 1 Hughes, 531 [Fed. Cas. No. 15,455]; United States v. Rennecke [D. C.] 28 Fed. 847. It is quite evident that an indictment averring in the language of section 18 that the defendant sold or offered for sale the liquors named, without averring that he made this a business, and that he had not paid the special tax required by law, would be insufficient."

It must be conceded that the quoted language was not necessary for a decision of the point before the Supreme Court in the Ledbetter Case; but it is evident that at least the writer of the opinion (Mr. Justice Brown) thought the statute should be construed as we have indicated our view to be. This view is also confirmed by the approving citations of United States v. Jackson, 1 Hughes, 531, Fed. Cas. No. 15,455, and United States v. Rennecke (D. C.) 28 Fed. 847. In the Jackson Case, Judge Hughes instructed the jury that selling an occasional drink did not constitute carrying on a business so as to justify the imposition of the tax. Some of the language, like some of that in United States v. Logan, Fed. Cas. No. 15,624, goes further than we should wholly approve, since it has been decided that such a law is not to be read with the strictures of a penal statute (United States v. Stowell, 133 U. S. 1, 10 Sup. Ct. 244, 33 L. Ed. 555); but the case supports our general interpretation. In the Rennecke Case, Judge Simonton had the point before him and said:

"If the sale was under such circumstances as indicated that the defendants had the liquor on hand to be sold to any one who applied for it, then they may be said to be engaged in the business, although but one act of selling has been proved. On the other hand, if they permitted a neighbor or friend to have a part of the supply of whisky which they had on hand for their own use, and did this in a spirit of accommodation, they could not be said to be engaged in the business, even if they received money for this accommodation."

He repeated, substantially, the same expression, in United States v. Bonham (D. C.) 31 Fed. 808.

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The district attorney relies upon several decisions to support the charge given, but they are all, perhaps with one exception, distinguishable. United States v. Barnhardt, Fed. Cas. No. 14,526, and United States v. Damiani, Fed. Cas. No. 14,915, are so scantily reported that they may well hold merely that a single sale may be sufficient evidence of carrying on the business—a proposition about which there is no doubt. In United States v. Alexis Club (D. C.) 98 Fed. 725, the only question involved was whether a social club which carried a stock of liquors and dispensed them to its own members for pay should be considered a retail dealer. Judge McPherson refers to section 3244 by way of definition; but we find nothing in the opinion to indicate that an isolated, single sale, not part of a course of business, would have been considered a violation of the law. The case of United States v. Angell (C. C.) 11 Fed. 34, is the possible exception. The defendant requested an instruction that he was not guilty unless he was engaged in the sale of liquor "as a trade or business." The court refused this instruction and charged in the language of section 3244, as it existed in 1867. It is perhaps worth noting that this statutory definition did not then refer to "one who sells in quantities less than," etc., but to "every person who shall sell * * * and whose annual sales do not exceed," etc.; but, if the decision should not be restricted on account of this peculiar language, we do not find that it has been followed, and it certainly is inconsistent with the above quotation from the Ledbetter Case.

It has often, perhaps commonly, been taken for granted that something more than merely the single sale must be found or inferred by the jury in order to convict. For example, see United States v. Allen (D. C.) 38 Fed. 736, where Judge Shiras said:

> "It is the dealing in liquors that constitutes the taxable business."

There are decisions of state courts, like People v. Wilcox, 152 Mich. 39, 41, 115 N. W. 973, which punish a single sale; but they so far involve, directly or indirectly, a state policy of prohibition, that they are not very persuasive in construing a revenue law.

We are convinced that the true rule of construction is that stated by Judge Simonton, with some modification; that a single sale is to be interpreted in the light of all the circumstances, and it may vary from being little or no evidence up to the point of being convincing evidence that the seller is carrying on the business; and that, in order to convict, the jury should be satisfied that the defendant either had liquor on hand, or was ready and able to procure it, in either case with the purpose of selling some or all of it to such persons as he might from time to time find or conclude to accept as customers.

The request for instructed verdict for the defendant was rightly denied. From the testimony of the government's witnesses, including that with reference to previous sales at the same place by defendant's husband, the jury had the right to infer, if satisfied thereof beyond a reasonable doubt, that Mrs. Bailey's story was essentially untrue, and that her assumed reluctance to sell and yielding to urging were a subter-

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fuge, for the purpose of concealing her readiness to make a sale after she was satisfied it would be safe.

The judgment must be reversed, and the case remanded for new trial.

(259 Fed. 93)

BIANDI v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. February 5, 1919.)

No. 3208.

CRIMINAL LAW ⟹419, 420(3)—ADMISSION OF HEARSAY EVIDENCE.

In a prosecution for carrying on the business of a retail dealer without having paid the special tax therefor, it was prejudicial error to permit the prosecuting witness on direct examination to testify that he undertook to buy liquor from defendant because he had been told that defendant was selling.

In Error to the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

Criminal prosecution by the United States against E. Biandi. Judgment of conviction, and defendant brings error. Reversed.

Jere Horne and Phil. M. Canale, both of Memphis, Tenn., for plaintiff in error.

Wm. D. Kyser, U. S. Atty., of Memphis, Tenn.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. Biandi was convicted of violating R. S. § 3244 (U. S. Comp. St. § 5971), by engaging in business as a retail liquor dealer without paying the tax, and he prosecutes this writ of error. His trial occurred immediately following that of Mrs. Bailey, No. 3209, 259 Fed. 88, 170 C. C. A. 156, whose case we have considered and disposed of by an opinion filed herewith. The facts in the Biandi Case are materially different in some respects from those in the Bailey Case, but the charge of the court to the jury shows that the case was tried upon and the conviction may rest upon that interpretation of the statute which, in the Bailey Case, we have felt compelled to think was erroneous. Biandi's counsel took no exception to the charge, nor did he present any requests to charge which properly saved the point. Perhaps the fact that similar exception to the charge in the Bailey Case had been unavailing tends to explain its absence here. We do not find it necessary to decide whether we ought to proceed under rule 11 (202 Fed. viii, 118 C. C. A. viii), in spite of no exception and no assignment of error, because there is an error duly assigned which would, of itself, justify reversal.

The prosecuting witness was allowed to state that he undertook to buy liquor from Biandi because he had been told that Biandi was selling. This was, quite obviously, merely hearsay, and inadmissible as direct evidence against respondent. Such matters may drop out during cross-examination, and the court can, by proper instruction,

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prevent unlawful prejudice; but here the matter was directly developed, and the protest and objection of defendant's counsel were not met by any instruction or caution to the jury. This was especially prejudicial, because the statement was made in the course of an examination by the court.

In such cases as this, no doubt the presence or absence of any previous sale is a relevant fact to be proved one way or the other by witnesses competent to speak; but this may not be done by hearsay. The request for an instructed acquittal was properly refused.

The judgment must be reversed, and the case remanded for a new trial, under that interpretation of the statute indicated by our opinion in the Bailey Case.

(259 Fed. 94)

LAUGHTER v. UNITED STATES. LAUGHTER et al. v. SAME. RIVALTO v. SAME. ANDERSON v. SAME.

(Circuit Court of Appeals, Sixth Circuit. January 17, 1919.)

Nos. 3150, 3185, 3212, 3221.

1. INTOXICATING LIQUORS ⟹132—TRANSPORTATION OF LIQUOR IN INTERSTATE COMMERCE—PROHIBITION STATE.

   To render the Reed Amendment (Act March 3, 1917, § 5 [Comp. St. 1918, §§ 8739a, 10387a–10387c]), prohibiting the transportation of liquor in interstate commerce, except for certain purposes, into any state "the laws of which prohibit the manufacture or sale therein," of liquors for beverage purposes, applicable to a state, it must have adopted a general policy of prohibition throughout its territory; but it is not essential that such prohibition should be literally without exception.

2. INTOXICATING LIQUORS ⟹132—TRANSPORTATION OF LIQUOR IN INTERSTATE COMMERCE—PROHIBITION STATE.

   Under various statutes of Tennessee, taken together, both the sale and the manufacture of liquor for sale as a beverage are prohibited throughout the state, and the transportation of liquor into the state for beverage purposes is in violation of the Reed Amendment (Comp. St. 1918, §§ 8739a, 10387a–10387c).

3. CONSPIRACY ⟹28—CONSPIRACY TO VIOLATE REED AMENDMENT.

   There may be a conspiracy to violate the Reed Amendment (Comp. St. 1918, §§ 8739a, 10387a–10387c) by transporting liquor into a prohibition state, indictable under Criminal Code, § 37 (Comp. St. § 10201).

4. CRIMINAL LAW ⟹395—EVIDENCE—PAPERS TAKEN FROM ACCUSED.

   It was not error to admit in evidence against a defendant papers taken from his pocket after his arrest, where their return had not been requested.

5. CONSPIRACY ⟹37—CRIMINAL RESPONSIBILITY—MERGER IN SUBSTANTIVE OFFENSE.

   To create such relation, between a conspiracy and the substantive offense which was its purpose, as ought to prevent a double prosecution, there must be a complete identity between those acts which are the overt acts essential to make the conspiracy punishable and those acts which are necessary to make out the substantive offense.

6. CRIMINAL LAW ⟹1165(1)—SEARCHES AND SEIZURES ⟹5—HARMLESS ERROR—PAPERS SEIZED FROM DEFENDANT—RIGHT TO RETURN.

   Denial of a motion by defendant for the return of papers taken from his pocket after arrest *held* error, but without prejudice; the only one admitted in evidence being cumulative upon a point fully established otherwise.

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In Error to the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

Criminal prosecutions by the United States against E. A. Laughter, against E. A. Laughter and W. Newton Fisher, against Alphonso Rivalto, and against A. L. Anderson. Judgment of conviction in each case, and defendants bring error. Affirmed.

Certiorari denied 249 U. S. 613, 39 Sup. Ct. 388, 63 L. Ed. —.

Charles M. Bryan, of Memphis, Tenn., for plaintiffs in error Laughter and Fisher.

Frank S. Elgin, of Memphis, Tenn., for plaintiffs in error Anderson and Rivalto.

Wm. D. Kyser, U. S. Atty., of Memphis, Tenn.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge. These four cases involve a common question, whether the Reed Amendment is applicable to Tennessee, and each case presents further specific questions. The latter are of such minor relative importance that the four cases may well be disposed of by one opinion. It is not necessary to state facts, except as to the specific questions.

The so-called Reed Amendment was inserted in, and became a part of section 5 of the Post Office Appropriation Act of March 3, 1917, c. 162, 39 Stat. 1069 (Comp. St. 1918, § 8739a). It reads as follows:

"Whoever shall order, purchase or cause intoxicating liquors to be transported in interstate commerce, except for scientific, sacramental, medicinal, and mechanical purposes, into any state or territory, the laws of which state or territory prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes, shall be punished as aforesaid: Provided," etc.

The precise question then is: Do the laws of Tennessee "prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes"? The first controversy arises over the meaning and effect of the disjunctive in the phrase "manufacture or sale." Is it intended to refer to a state the laws of which either prohibit the manufacture or prohibit the sale, or only to a state the laws of which both prohibit the manufacture and prohibit the sale? The language chosen presents, but does not solve, this ambiguity; nor do we find any necessarily controlling interpretation flowing from the reasons which may be supposed to have moved Congress to the passage of the law. We do not think it necessary in this case to decide whether a state which prohibited the manufacture, but permitted sale, or a state which forbade sale, but allowed manufacture, would be within the scope of the act. For the purposes of this opinion, we assume that the act is not applicable unless by the law of the state neither manufacture nor sale is permitted.

[1] A question is next raised as to the meaning of "prohibit." Does this refer to a local and limited, or only to a general and universal, prohibition? We are strongly inclined to the view that Congress did not intend to extend the aid of this act, except to those states which had adopted a general policy of prohibition throughout their territorial

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limits; and, without expressly so deciding, we give the benefit of the doubt to the persons indicted, and assume that the state prohibitory laws must have a broad and general application. However, there is neither in the language of the act, nor in the reasons which caused its passage, any ground for requiring that the prohibition of manufacture and of sale should be literally without exception. A substantial covering of the whole territory and of the whole subject is the utmost that can be required, and any merely trifling and inconsiderable omission of area or of acts from the otherwise universal law must be regarded as negligible for the purposes of this inquiry.

[2] Coming to the Tennessee laws: Section 1 of chapter 1 of the Acts of 1909, provides:

"That it shall not hereafter be lawful for any person to sell or tipple any intoxicating liquors, including wine, ale, and beer, as a beverage, within four miles of a schoolhouse, public or private, where school is kept, whether the school be then in session or not, in this state."

We cannot doubt that the great part of the state of Tennessee is within four miles from some schoolhouse; but just how far we might take judicial notice in that direction is made immaterial by the fact that the Supreme Court of Tennessee has declared what this situation is. In Motlow v. State, 125 Tenn. 547, 560, 145 S. W. 177, 180 (L. R. A. 1916F, 177), that court said, in speaking of a later act of 1909:

"At the time the act was passed, the situation in Tennessee was this: Sundry statutes had been passed, known as 'four-mile laws,' which had made it unlawful to sell intoxicating liquors as a beverage anywhere in the state within four miles of a schoolhouse, whether the school was in session at the date of the sale or not. These acts made it unlawful to sell intoxicating liquors anywhere in this state as a beverage, since there was no point that was not within four miles of a schoolhouse."

There is nothing in the case of Cheatham v. Patterson, 125 Tenn. 437, 145 S. W. 159, Ann. Cas. 1913C, 314, inconsistent with this declaration that the sale of liquor as a beverage is prohibited throughout Tennessee. The statement in the latter opinion that not all sales of intoxicating liquors are unlawful sufficiently rests upon the adjudged exemption of sales for nonbeverage purposes.

There is a further statute upon the subject of sales: By chapter 3, § 1, of the Acts of 1917, it was declared to be unlawful—

"for any person, firm or corporation to have or keep in stock, in any warehouse or place of business or other place within the state of Tennessee, any intoxicating liquors, including wine, ale or beer, intended for present or future sale as a beverage, either wholesale or retail, and whether intended to be sold for delivery at the place of sale or to be shipped or otherwise transported for delivery at another place."

Obviously there can be no substantial sales, unless the person selling may have on hand, at some place within the state, the liquor to be sold. Putting together the four-mile law and this law against keeping on hand for sale, we cannot doubt that the laws of Tennessee virtually prohibit the selling of liquor for beverage purposes.

Manufacturing for sale is expressly forbidden by section 1 of chapter 10 of the Acts of 1909. This provides:

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"That it shall not hereafter be lawful for any person or persons to manufacture in this state, for purposes of sale any intoxicating liquor, including all vinous, spirituous, or malt liquors: * * * Provided," etc.

It may be said that this leaves untouched the right of a citizen of Tennessee to manufacture for his own use. So it does; but, in view of the further restrictions, this right is brought nearly to the vanishing point. Section 4 of chapter 12 of the Acts of 1917 makes it unlawful—

"for any person to personally transport into this state or from one point to another within this state, even when intended for personal use, intoxicating liquors, including wine, ale and beer, in any quantity whatever."

The net result of all these statutes is that liquor cannot be sold within the state or be manufactured within the state for sale, and that while one may manufacture for personal use, he may not move it in any quantity or for any purpose away from the place of manufacture. Under these conditions, we are clear that there is, for the purposes of the question before us, sufficiently complete prohibition, throughout Tennessee, both of manufacture and of sale of liquor for beverage purposes. It follows that whoever brings liquor into the state in interstate commerce and for beverage purposes offends against the Reed Amendment.

[3] In the Laughter Case, No. 3185, Laughter and several others were indicted for violation of section 37 of the Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1096 [Comp. St. § 10201]), in that they conspired to violate the Reed Amendment by bringing liquor into Tennessee, and the writ of error is brought by Laughter against a conviction upon this indictment. His counsel urges that the Reed Amendment contemplates the necessary co-operation of two or more persons in order to make out an offense—in other words, that the statute is directed only against a conspiracy—and, upon this claim, bases the contention that only the substantive offense may be punished, and that indictment for conspiracy will not lie. The principle involved is said to be that declared for this court by Judge Lurton in Chadwick v. U. S., 141 Fed. 225, 236, 72 C. C. A. 343, 354, quoting from Wharton's Criminal Law:

"When to the idea of an offense plurality of agents is logically necessary, conspiracy, which assumes the voluntary accession of a person to a crime of such a character as that it is aggravated by a plurality of agents, cannot be maintained."

It may well be that, under the facts of the instant case, there was no violation of the Reed Amendment, except by those transactions which carried out the conspiracy, and that, under those facts, the conspiracy and the substantive offense ought not to be separately punished; but no question of double prosecution or punishment is presented in this case. The contention is the broad and general one that there can be no such thing as an indictment for conspiracy under this act. In that broad form, the contention is not good. The act plainly includes mere transportation, which may be the individual act of one person without any concert with others, and, in such cases, there is abundant room for additional and precedent conspiracy with others. In a very similar

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situation, we have recently held that it cannot be declared as matter of law that conspiracy and substantive offense may not have separate existence and be subject to separate prosecution. Kelly v. United States, 258 Fed. 392, 169 C. C. A. 408, opinion filed January 7, 1919.

It is said that there is no proof of the formation of any conspiracy within the district, as alleged in the indictment; that the only overt acts pleaded occurred outside of the district, and evidence of overt acts within the district was not admissible; and hence that the venue failed. The evidence tended to show that the liquor was loaded upon a boat further up the Mississippi, on the Arkansas side, by a man who then was, or recently had been, in partnership with Laughter in the liquor business, and that, when it arrived near Memphis, in the night and at a remote place, Laughter was present to meet it and to receive the liquor. The jury was entitled to infer from the facts proved that Laughter was the directing spirit of the enterprise, and had arranged in advance as to when and how the liquor should be sent, and had, in some manner, sent instructions to the place of loading. All this would naturally have been done in and from the Western district of Tennessee, where Laughter lived and had remained. There was ample justification for the conclusion that the conspiracy had been formed in this district. The instruction to the jury on the subject was not as clear and distinct as it might have been, but there is no sufficient ground to think the jury misunderstood.

Robinson, also named in the indictment as a conspirator, made a statement, after the arrests, and this was received in evidence against him, but with a warning to the jury that it was not against Laughter. The court did not, as requested, include in his final charge an instruction that this evidence must not be considered against Laughter; but it was not error to fail to repeat a warning recently given. Without regard to this Robinson statement, there were facts enough pointing to Laughter's guilt easily to support the verdict.

[4] Certain papers, taken from Laughter's pocket by the marshal when Laughter was arrested, were used in evidence against him. It may be that he was entitled to have these papers returned to him (Weeks v. U. S., 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177), but until he had asked for such return it was not erroneous to receive them in evidence (Adams v. N. Y., 192 U. S. 585, 595, 24 Sup. Ct. 372, 48 L. Ed. 575).

In case No. 3212, Laughter and his Arkansas partner, Fisher, were convicted of the substantive offense to which the conspiracy, involved in case No. 3185, related. Both respondents complain. Counsel for Fisher urge that the court, in effect, gave peremptory instructions against him. Fisher himself testified that he arranged for loading the whisky on the boat, and, in so doing, supposed he was acting in the interest of, or at the desire of, Laughter. There is, therefore, not the slightest doubt, on Fisher's own statement, that he did participate in causing this liquor to be transported into Tennessee. His only substantial defense is that he did not know it was going to Tennessee. There could be nothing prejudicial in the instruction that Fisher violated the statute if he did what he said he did, unless there was, in that

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connection, a failure to make sufficiently clear to the jury that Fisher would not be guilty unless he knew of the Tennessee destination. While some parts of the charge are open to criticism on this score, yet we are satisfied there was no prejudice therefrom. At the end of the charge, Fisher's counsel brought this matter to the attention of the trial court, who thereupon said to the jury:

"If you believe from the evidence that the defendant Fisher had no knowledge, at the time of the acts detailed by him in the evidence, of the destination of the liquor, then he did not commit any offense under the said Reed Amendment, and your verdict should be one of not guilty."

It is true that this instruction did not, as it should have done, expressly require the jury to find that Fisher had knowledge of the destination, rather than to make his lack of knowledge a condition of acquittal. In strict construction, and taken alone, this seems to overlook the matters of burden of proof and of reasonable doubt; but there already had been full instructions upon these subjects, and, under the facts of this case, to find, as the jury did, that the proofs failed to show Fisher's lack of knowledge is hardly distinguishable from finding that he did have knowledge. The difference is not substantial enough to justify reversal.

[5] In this case, No. 3212, Laughter insists that he has been twice punished for the same offense, and thus raises, in another aspect, the proposition that the conspiracy and the substantive offense cannot be separately prosecuted. The general unsoundness of this claim has already been discussed. So far as there may be in any case a relation between the two which ought to prevent a double prosecution, it will be only in those cases where there is complete identity between those acts which are the overt acts essential to make the conspiracy punishable and those acts which are necessary to make out the substantive offense. That complete identity does not here exist. The actual taking of the liquor from the river boat onto the shore was alone sufficient to constitute participation in interstate transportation and to justify conviction of the substantive offense; but this act was neither pleaded as one of the overt acts in the conspiracy case, nor was it essential to make out guilt of the conspiracy. The utmost effect of such similarity as here existed in the proofs relied upon to show the two offenses was to advise the discretion of the court in imposing the second sentence; it cannot support any claim of error.

[6] Just at the opening of the trial, in No. 3212, which occurred some three months after the trial and conviction in No. 3185, Laughter made a motion asking that the papers taken from his pocket, by the marshal at the time of his arrest, be returned to him. The motion was denied and exception taken. We are compelled to think that this action was erroneous, under the rule in Weeks v. U. S., supra. That the petition for return of the papers was very informal and indefinite in its description, and that it was made so shortly before trial, and that the papers, instead of being in the manual possession of the district attorney, had become a part of the record evidence filed in the former case, do not constitute sufficient grounds for denying the petition. There seems to have been no doubt regarding the papers to which the

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petition intended to refer. The delay in presenting the petition was immaterial, and there would have been no difficulty in getting the papers from the files to be returned. However, we cannot see that any substantial prejudice resulted. The only one of the seized papers, which was put in evidence or in any way used in this case, was a bill of lading which tended to identify the whisky which Laughter was receiving from the river boat as the same whisky which theretofore had been at the loading point in Arkansas. As an item of evidence against Laughter, it was so far merely cumulative that it is not reasonably to be supposed its reception in evidence could have had any substantial influence upon the verdict. Fisher, as a witness for respondents, had fully identified the whisky named in the bill of lading as that which he assisted in loading upon the river boat, and that the whisky, of which Laughter was found in control, had just been taken from the same river boat, was stated by Laughter and was clear beyond any reasonable doubt. In the Weeks Case, the lottery tickets, taken from Weeks' possession and put in evidence, seem to have been an important, if not essential, part of the case made against him.

In the Anderson Case, No. 3150, the only substantial point sought to be made, in addition to the inapplicability of the Reed Amendment to Tennessee, is that Anderson was not carrying the liquor "in interstate commerce," but that it was a part of his personal baggage, intended for his personal use, and having no connection with any contemplated commercial transaction. A defense of this kind has been held sufficient (U. S. v. Mitchell [D. C.] 245 Fed. 601), and the precise question seems now to be awaiting decision by the Supreme Court in United States v. Hill (No. 357, October Term, 1918) 248 U. S. 420, 39 Sup. Ct. 143, 63 L. Ed. 337. It is not raised by this record. The liquor in question consisted of some 20 quarts, packed in excelsior, in a small trunk. It does not appear there was anything else in the trunk. The jury had as much right to suppose that it was brought in for sale as for personal consumption. There was no request to charge, or exception to the charge, which saves the question now urged.

In the Rivalto Case, No. 3221, the further specific objection is that there was no evidence to justify conviction. We think the circumstances sufficiently point to the conclusion that Rivalto participated in ordering or transporting or causing the transportation of a quantity of liquor which might have been for purposes of resale and which was taken from an interstate train on its arrival in Memphis. The only plausible objection to the sufficiency of proof is that this train had traveled for more than 100 miles and made several stops after it entered the state of Tennessee, and that there is nothing to show that the liquor was on board before the train came into the state. The train had come directly through from Cairo, Ill., where liquor could lawfully be bought. For it to have been purchased and loaded upon the train in Tennessee would necessarily have involved violation of the Tennessee laws, and to assume Tennessee origin would be to presume that at least one, and probably several offenses against Tennessee laws had been committed. The liquor was in bottles which bore labels pur-

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porting to show that it had been recently bottled for some dealer in Cairo. These labels were received in evidence without objection. The combined force of these circumstances was enough to justify the jury in thinking that the journey which ended in Memphis began in Cairo.

In these four cases, there are 130 assignments of error. We think no one has been overlooked, but they do not require further specific attention. Some rulings on evidence which might be thought subject to criticism were not prejudicial, or were cured by other rulings or instructions; some requests to charge, which were denied, and which might have been given, were sufficiently covered by the general charge; other requests, which were refused, although appropriate enough in their general thought, were made subject to denial by reason of their uncertain or double form; some of the assignments which provoke attention have no exception to rest upon; those which challenge the sufficiency of the proofs to support the verdict overlook the fact that verdicts may rest upon rightful inferences as well as upon direct testimony; and others relate only to matters of discretion.

Each of the four judgments is affirmed.

(259 Fed. 101)

ROBILIO v. UNITED STATES (two cases).

(Circuit Court of Appeals, Sixth Circuit. March 5, 1919.)

Nos. 3224, 3225.

1. CRIMINAL LAW ⟹559—SUFFICIENCY OF EVIDENCE—INFERENCE.
   A verdict in a criminal case may rest upon rightful inference, as well as upon direct testimony.

2. CRIMINAL LAW ⟹787(1)—TRIAL—INSTRUCTIONS.
   It is not necessarily error to instruct the jury, in the language of the statute, that defendant's failure to testify creates no presumption against him.

3. CRIMINAL LAW ⟹656(7)—COMMENTS OF COURT ON EVIDENCE.
   Remarks of the court to the effect that the situation created by the government's proofs remained unexplained *held* not a comment on defendant's failure to testify.

In Error to the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

Criminal prosecution by the United States against Joe Robilio and Louis Robilio. Judgment of conviction, and defendants separately bring error. Affirmed.

Phil. M. Canale, of Memphis, Tenn., for plaintiffs in error.
Wm. D. Kyser, U. S. Atty., of Memphis, Tenn.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

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PER CURIAM. Writs of error upon a conviction under Act March 3, 1917, c. 162, § 5, 39 Stat. 1069 (Comp. St. § 8739a)—the Reed Amendment—for transporting intoxicating liquor from Kentucky into Tennessee.

[1] Aside from any "confession," there was sufficient evidence from which the jury might find that the offense had been committed, as well as that the liquor was not for one of the excepted purposes. Verdicts may rest upon rightful inference, as well as upon direct testimony. Laughter v. United States (C. C. A. 6) 259 Fed. 94, 170 C. C. A. 162, opinion filed January 17, 1919.

[2] It does not follow from anything held in McKnight v. United States (C. C. A. 6) 115 Fed. 972, 982, 54 C. C. A. 358, that it is necessarily error to instruct the jury in the language of the statute (U. S. Comp. St. 1916, § 1465) that defendant's failure to testify creates no presumption against him. Hanish v. United States (C. C. A. 7) 227 Fed. 584, 586, 142 C. C. A. 216; Stout v. United States (C. C. A. 8) 227 Fed. 799, 803, 142 C. C. A. 323.

[3] The additional remarks of the court to the jury, to the effect that the situation created by the government's proofs remained "unexplained," as such remarks would naturally be applied to the facts of this case, and as they were interpreted by the response of the court when his attention was called thereto, did not constitute that "comment" condemned in Wilson v. United States, 149 U. S. 60, 13 Sup. Ct. 765, 37 L. Ed. 650. See Stout v. United States, supra, 227 Fed. at page 804, 142 C. C. A. 323, and Shea v. United States (C. C. A. 6) 251 Fed. 440, 445, 163 C. C. A. 458.

The proof that the officers were waiting at the point where the arrest was made, because they had been told that liquor was to be brought in by some one, does not impress us as an attempt to prove the guilt of these defendants by hearsay testimony, within the principle of Biandi v. United States (C. C. A. 6) 259 Fed. 93, 170 C. C. A. 161, opinion filed February 5, 1919.

The judgment in each case is affirmed.

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(259 Fed. 103)

TURNER v. UNITED STATES.

NESBIT v. SAME.

(Circuit Court of Appeals, Sixth Circuit. March 5, 1919.)

Nos. 3226, 3227.

1. CRIMINAL LAW ⟹1030(3), 1048—APPEAL—EXCEPTIONS.
Where it is sought to differentiate the case of an employé from that of his employer, charged together with an offense, in view of Criminal Code, § 332 (Comp. St. § 10506), making aiders and abettors principals, the points relied on must be brought to the attention of the trial court, and exceptions saved to its rulings, to insure review by the appellate court.

2. CRIMINAL LAW ⟹935(2)—MOTION FOR NEW TRIAL—FAILURE TO PROVE VENUE.
It is not proper practice to reserve a claim that venue was not sufficiently proved for determination on a motion for new trial.

In Error to the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

Criminal prosecutions by the United States against Richard D. Turner and against Tom Nesbit. Judgments of conviction, and defendants bring error. Affirmed.

Phil. M. Canale, of Memphis, Tenn., for plaintiffs in error.
Wm. D. Kyser, U. S. Atty., of Memphis, Tenn.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. The proprietor of a roadhouse near Memphis, and his negro porter, were convicted of engaging in business as retail liquor dealers without paying the tax (R. S. § 3244; U. S. Comp. St. § 5971), and bring separate writs of error.

[1] The proof was ample to support the conviction against the proprietor. The particular claims now made for the porter, because he was only an employé, were not brought to the attention of the court during the trial or saved by exceptions. The effect of section 332 of the Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1152 [Comp. St. § 10506]) is such that we cannot overlook the lack of exception.

[2] Likewise the claim that the venue was not sufficiently proved was reserved for a motion for new trial. We cannot approve that practice; nor is the claim as to Turner supported by the record.

Each judgment is affirmed.

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(259 Fed. 104)

JONES et al. v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. May 6, 1919.)

No. 3218.

INTOXICATING LIQUORS ⟹236(1)—INTERSTATE COMMERCE—TRANSPORTATION OF LIQUOR INTO PROHIBITION STATE.

Proof that defendants loaded liquor into an automobile in Mississippi, and had carried it across into Tennessee, along the highway to Memphis, when arrested, *held* sufficient to sustain a conviction for violation of the Reed Amendment, although in following the road they were about to cross the line again into Mississippi; there being evidence to warrant a finding that their intended destination was Memphis.

In Error to the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

Criminal prosecution by the United States against Sam Jones and Bennie Bryan. Judgment of conviction, and defendants bring error. Affirmed.

Ralph Davis, of Memphis, Tenn., for plaintiff in error.

Wm. D. Kyser, U. S. Atty., of Memphis, Tenn.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge. Because the facts of this case, in some respects, resembled those of United States v. Gudger, 249 U. S. 373, 39 Sup. Ct. 323, 63 L. Ed. 653, pending in the Supreme Court when this was argued, we have withheld opinion until that case should be decided. It was disposed of by that court on April 14, 1919, but we do not find therein anything controlling the peculiar facts now involved.

The respondents were indicted for violating the so-called Reed Amendment. Act March 3, 1917, c. 162, § 5, 39 Stat. 1069 (Comp. St. 1918, § 8739a). Tennessee is a state "the laws of which * * * prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes." Laughter v. United States, 259 Fed. 94, 170 C. C. A. 162 (C. C. A. 6, January 17, 1919). The city of Memphis, near the southwestern corner of the state, is only a few miles north of the Tennessee-Mississippi line. The intoxicating liquor involved first appears in this record as located near the bank of the Mississippi river, in the state of Mississippi, and just south of the state line. It had probably been landed at this point from a river boat. Owing to the existence of lakes or old bayous, the usually traveled highway from this point to Memphis is circuitous. It runs northwesterly across the state line into Tennessee, then swings around a crescent and goes southwesterly back into Mississippi, and then around another curve northerly into Tennessee and to Memphis. The respondents went out at night, from Memphis, in an automobile, to the point where the

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liquor was stored and loaded it into their machine. To justify the verdict, under the charge of the court, the jury must have found that the respondents then started back for Memphis, intending to follow this highway clear through, and not intending to stop at all in Mississippi, and there was evidence supporting this finding. While they were upon the crescent-shaped part of the road which was in Tennessee, and when just about to cross back into Mississippi, they were stopped and arrested and the liquor seized. Upon these facts, they were convicted in the court below; and they complain of the conviction because, they say, no offense named in the statute had been completed.

The statute was directed against those who "order, purchase or cause to be transported * * * into a state, etc." Apparently, "order" and "purchase" have to do merely with the precedent purpose, but "cause to be transported" pertains to the actual carrying of the liquor; and it may, at least for the purpose of this case, be conceded that the offense defined by these last words has not been committed until the liquor has actually been carried across the state line into the "dry" state. The most that can be said of the Gudger Case in its application here is that the spirit of the statute, and therefore the statute itself, is not infringed unless the "dry" state, which has been reached, is the state of intended final destination. In this case, Tennessee was the state of intended final destination; the liquor had in fact been transported in interstate commerce into that state, and hence both the spirit and the letter of the statute are satisfied; and we consider the guilt of the respondents to be clear.

Perhaps the severest test to which this conclusion can be subjected is to suppose that the respondents had continued, unmolested, southwesterly across the state line into Mississippi, and then, while passing through Mississippi, and before re-entering Tennessee, they had changed their minds and decided to sell the liquor in Mississippi or leave it permanently stored there. If prosecuted under these facts, they would doubtless claim the benefit of the rule that a crime is not complete so long as the opportunity for repentance exists; and they might suggest the application of the same rule here. We cannot think it to be applicable. The precise offense denounced in so many words by the statute was completed the moment the liquor was carried, for the first time, into Tennessee. The further question can only be as to its ultimate destination at that moment. When the actual transportation into and presence in the state and the intent that it should finally permanently remain in the state simultaneously existed, the offense was completed, and it was too late for repentance. We think the intent to make a further brief swing outside the state before coming to rest therein should be treated as merely incidental, and that what might have happened, but did not, to change the character of this outside step from something incidental to something substantial, is too remote to be important.

One of the respondents, Jones, was a laborer, incidentally hired by the other respondent. Whether Jones could rightly be said to have caused the liquor to be transported, and whether he can be said to have

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aided and abetted Bryan within the meaning of section 332, are questions which are not raised by exception or assignment, and we do not find it necessary to consider them. Nesbit v. United States, 259 Fed. 103, 170 C. C. A. 171 (C. C. A. 6, March 5, 1919).

The judgments are affirmed.

(259 Fed. 106)

MOSLEY et al. v. KENTUCKY COAL LANDS CO.

(Circuit Court of Appeals, Sixth Circuit. December 19, 1918.)

No. 3154.

1. ADVERSE POSSESSION ⟹100(4)—GROUNDS OF PRESCRIPTION—LAND CLAIMED UNDER DIFFERENT RIGHTS.

It is the settled rule in Kentucky that, when the alleged disseisor with color has good title to part of his described tract, and none to the remainder, such actual possession as he takes within the limits of his good title will be referred to that title only, and that outside of such limits he can prevail against an adverse title only by depending upon actual possession within the interference or overlap between such adverse title and that part of his own entire claim which is only color, and not title.

2. ADVERSE POSSESSION ⟹100(2)—EXTENT OF POSSESSION—UNRECORDED DEED.

In Kentucky, where land granted or conveyed is described by irregular boundaries, and not by government subdivisions, the recording of a deed giving color of title is not essential to the extending of the grantee's actual possession constructively to the boundaries named therein.

3. ADVERSE POSSESSION ⟹100(4)—EXTENT OF POSSESSION—DESCRIPTION IN DEED.

Boundary of a tract of land as described in the deed *held* sufficiently well defined, under the Kentucky rule, to make a basis for constructive adverse possession of the whole tract by the grantee beyond his actual occupation.

4. ADVERSE POSSESSION ⟹21—ACTUAL POSSESSION—ACTS OF OWNERSHIP.

Continuous cultivation of land every other year for the statutory period, while in alternate years it is used for pasture, but remains inclosed, is sufficient to meet the requirements of adverse possession.

Appeal from the District Court of the United States for the Eastern District of Kentucky.

Suit in equity by Elihu Mosley and another against the Kentucky Coal Lands Company. Decree for defendant, and complainants appeal. Reversed.

This is a bill to remove a cloud from title to real estate, and it presents problems concerning the character, extent, and effect of possession of lands in Kentucky. The title of Mosley, plaintiff below, was based wholly upon adverse possession; the District Court thought it not sufficiently made out, and dismissed the bill, and Mosley appeals.

The Kentucky statutory period of adverse possession necessary to make title is 15 years. This suit was commenced in 1911. In February, 1882, Lucy Roberts made a deed to Henry Mosley. She had no title or color of title to the described premises (except as to certain parcels thereof). Henry Mosley moved upon the premises, built a house, and occupied them until his death in December, 1883. He left a wife and several sons and daughters, who continued the same occupation. Elihu Mosley, a son, purchased the interests of his coheirs (excepting that of one sister, who joined with him as plaintiff), continued the occupation, and brought this suit.

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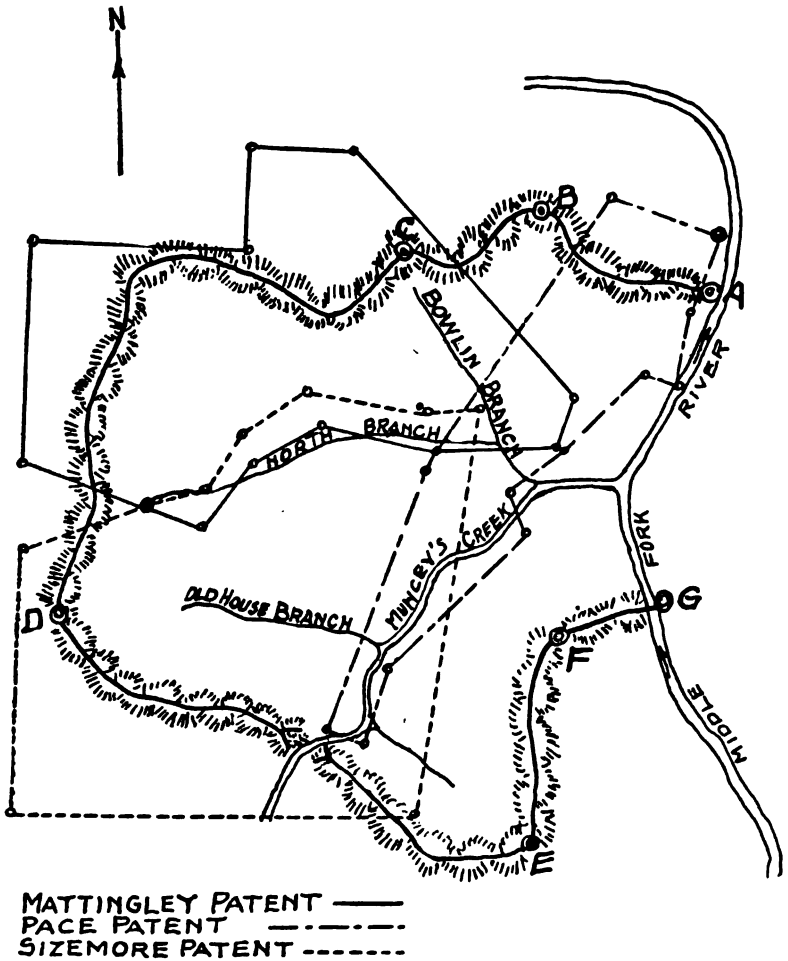
The defendant claims under two patents, one of which was issued to William Mattingly, for 100 acres, in 1846, and overlaps and includes the northwesterly part of the tract said to be described by the Roberts-Mosley deed, and the other of which was issued to William Sizemore, for 50 acres, in 1885, and overlaps the southwesterly part of the deeded tract. The questions involved can be better understood by reference to the sketch map here reproduced, showing approximately the relative location of the chief natural objects and



lines involved. Muncey's creek, flowing north and then east, enters the Middle fork of the Kentucky river. About half a mile up the creek, we find a high ridge at right angles to the creek, and which, with a break where the creek comes through, continues east until it joins the ridge between the creek and the river. Going up the creek from the mouth, and before reaching this ridge, there are two branches on the right and one small one on the left. The ridges which mark the watershed of all these branches, taken in connection with the cross-over ridge just mentioned and the ridge between the river and the creek, make a fairly continuous line of ridges in the approximate form of a horseshoe, closed at the mouth by the river and including about 400 acres;

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and this is the boundary now claimed by Mosley to be that described in the Roberts deed. The heavy black line indicates the summit of the ridges just recited. True, these natural objects do not form so obvious an inclosure as might be thought if the description went no further, because it includes other ridges among the two branches, because the cross-over ridge is not continuous, but is broken into fan-shaped spurs on both sides of the creek, and because the line F G departs from the main ridge. For 50 years before Mosley took his conveyance, Lucy Roberts' father, Bowlin, and she and her first husband, Godsey, and she and her second husband, Roberts, had lived upon the bottom lands along the creek or the mouth of these branches, with houses in three different locations, and with a considerable acreage of lands under fence and under cultivation. Henry Mosley and his children continued and extended this occupation, and, for more than 15 years before the suit commenced, had actually occupied, with buildings or cultivation, probably 50 acres. For the whole 80 years before suit commenced, no one other than the Bowlin, Roberts, and Mosley families had ever lived within this external boundary or had any actual possession of any part thereof, excepting that Thomas North, a predecessor of defendant, under the Mattingly grant, had lived thereon for a few years prior to 1864, at which date he permanently moved away, and excepting—if they be exceptions—running of lines and cutting of timber.

The greater part of the actual occupation by the Mosleys and their predecessors was within the lines of a patent to Robert Pace, about simultaneous with that to Mattingly. There is no direct proof that this Pace patent belonged to Lucy Roberts or her predecessors in occupancy; and, if it were a controlling question, we should have to decide whether certain facts indicating such occupancy by her under the Pace patent were sufficient to support a conclusion to that effect. However, for the purposes of this opinion and without intending any decision thereon, we assume that it must be considered that when Mosley entered under the Roberts deed, he took a good title to so much of the boundary as was covered by the Pace patent, and no paper title to the part outside of that patent. The sole question involved in this suit is whether Mosley's actual possession within his deeded boundary operated to give him that constructive possession to the limits of the boundary which is, under the law of Kentucky as well as other states generally, finally sufficient to overcome a better paper title. It is the settled rule in Kentucky that when the alleged disseisor, with color, has good title to part of his described tract and none to the remainder, such actual possession as he takes within the limits of his good title, will be referred to that title only, and that outside of such limits he can prevail against an adverse title only by depending upon actual possession within the interference or overlap between such adverse title and that part of his own entire claim which is only color and not title. We, therefore, assume that Mosley can prevail against defendant only by virtue of his actual possession outside of the Pace patent.[1]

Cleon K. Calvert, of Hyden, Ky., for appellants.
Wm. Ayres, of Pineville, Ky., for appellee.

Before KNAPPEN and DENISON, Circuit Judges, and McCALL, District Judge.

[1] As the defendant's boundaries are stated in the deed to it and as they were shown on the map on which defendant relied during the first hearing, they paid no attention to the Pace patent, but included about half of it, including also a considerable part of the Mosley permanent improvements within the Pace lines. Later, defendant seems to have adopted the theory that Pace was valid and senior to Mattingly and Sizemore, and, accordingly, made a new map and reconstructed its tract so as to exclude Pace. Perhaps defendant ought not to be heard to deny that these improvements are within the interference between plaintiff and defendant; but we give the defendant the benefit of the doubt.

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DENISON, Circuit Judge (after stating the facts as above). [1, 2] The Roberts-Mosley deed was not recorded until 1908, and the first question is whether the doctrine that constructive possession extends to the limits fixed in the deed, applies as well when that instrument is not recorded as when it is. This has not been expressly decided in Kentucky. In Poage's Heirs v. Chinn's Heirs, 4 Dana (Ky.) 50, the court was dealing with a statute, but it is apparent that the possession involved was largely of the constructive character now involved. It was held that record of the immediate instrument under which the disseisors claimed was not essential (see page 55). True, the conveyance from the state, which was the original source of the disseisor's color, was on record; but this does not seem to be controlling. In Ring v. Gray, 6 B. Mon. 368, the court had before it the fact that possession had been held under a deed which was void as against creditors because not recorded. In considering the character of such possession as against other claimants under the common grantor, the court said (page 374):

"No principle is better settled than that the possession of a grantee in a deed, is adverse to a grantor, and it is equally so as between them, whether the deed is recorded or not. Does the statute, by declaring that an unrecorded deed shall not be good as against a creditor, change the character of the possession as between the parties to such a deed? Does it convert an adverse into a friendly possession? We are not aware that it has ever been so decided and we are not prepared to give it that construction."

Possession, under a deed with warranty, is (normally) as hostile and adverse to those claiming under conflicting sources of title as it is to the grantor. This holding that an unrecorded deed characterizes the possession taken under it seems applicable to the general question we have before us. In Krauth v. Hahn, 139 Ky. 607, 612, 65 S. W. 18, 19, the question of constructive possession was distinctly involved and it was held that an instruction that to establish adverse possession it must have been "under a title of record to a well-defined and clearly-marked boundary," was erroneous. The court said:

"A party may, by 15 years' adverse possession, ripen his holding into a title whether he has any title of record or not."

It seems to be a necessary inference from the decision that it applied to that possession which was constructive only as well as to that which was actual. If so, it decided the point now involved. In the Burt & Brabb Lumber Co.—Sackett Cases, 147 Ky. 232, 144 S. W. 34, and 150 Ky. 748, 150 S. W. 997, there was the mere recital so often found that when possession is taken under a deed of record, it constructively extends to the boundaries named. This is, of course, true, because the greater includes the less, but whether the rule would be different if the deed were not recorded was not mentioned and perhaps did not occur to the court in these cases. In Lipps v. Turner, 164 Ky. 626, 176 S. W. 42, it is expressly said:

"The deed must not only be of record, but must describe the land conveyed with reasonable certainty."

The facts of the case show that the deed there involved was of record and that the only question for consideration for the court was as to the

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sufficiency of the description. The statement in the opinion that the deed must be of record was clearly at the most the understanding of the writer of the opinion and was not the decision of the court. In Hatfield v. Hatfield (Ky.) 113 S. W. 59, the fact that the deed was unrecorded seemed not to be thought inconsistent with constructive possession thereunder.

This review of the Kentucky cases makes it clear that we must decide the question according to the controlling reasons and the generally established rule. In order to be effective to perfect his right, the possession of the disseisor must be considered to extend as far as the stated boundaries, and must be so notorious as to support the conclusion that the true owner is to be charged with knowledge. If the record of the deed under which the disseisor claims is of any importance, it must be because it bears upon one or the other of these elements of adverse possession—extent or notoriety. When the entry is under a deed and actual possession of a part is taken, the established rule extends the possession to the boundary. Clearly, the matter of record of the deed has nothing to do with this element, extent of possession. One who had actual knowledge of the deed and of the entry under it would not be heard to deny that constructive possession extended to the boundary, even though the deed was not recorded; and this demonstrates that if the lack of record has any bearing it must be upon the other element, notoriety. It can be seen that under some systems of recording, where conveyances are indexed or abstracted according as they touch definite tracts like a subdivision of a government survey, the owner of such a tract could keep himself informed by occasional references to the record as to whether somebody's constructive possession might be extending over his tract, and here there would be room for the thought that recording might aid to give that degree of notoriety necessary to raise the presumption that notice reached the true owner. However that might be, there is scant room for that thought under the Kentucky system. The true owner could get no information as to what conveyances might be recorded from time to time touching his tract—short of reading all of the recorded conveyances—unles he knew the name of some possible grantee, conveyances to whom should be examined; and he could not know the name of such grantee unless he had been upon the property and observed that some person was actually occupying a part. In that event, he could get information as to the extent of the claim by asking the occupant, more easily and more effectually than going to the county records to see if any conveyance to this occupant had been recorded.

The recording statutes of Kentucky, as well as of other states generally, are for the purpose of protecting one who deals with the holder of the record title. They cannot operate as notice, excepting as they themselves declare that operation, and we find nothing in any Kentucky recording statute which makes the record of a deed notice thereof to a claimant under another chain of title.

We see no reason why it should be required that there must be notoriety as to the precise territorial extent of the occupant's claim to lands beyond his house and fields, under such a situation as prevailed in Ken-

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tucky at this time. There was no government survey or other practice by which tracts were claimed in quarter sections or in parallelograms; patents and grants were bounded by irregular lines, and an occupied house and field along a creek bottom fairly indicated to all a patent or deed including additional lands extending in some direction and not customarily marked by fences or boundaries obvious to the casual passer-by. These conditions furnish an appropriate situation for applying the familiar rule that possession is notice of whatever claim the party has, and that all others are put upon duty to inquire of the occupant as to the character and extent of his claim. If this is the rule to be applied, there is no reason to doubt that inquiry of Mosley at any time within 20 years before suit, would have revealed that he was claiming under the Roberts deed to the full extent thereof; but even if the notoriety of the claim to the external limits of the description must be separately established and found otherwise than as an inference from the notoriety of the actual possession, still the record of the deed cannot be controlling. It will be evidence of notoriety as applied to this doubtful zone; but there may be other sufficient evidence. True, a mere claim that a certain line is the boundary line named in a grant will not establish it at that place when it really is somewhere else, no matter how long-continued the assertion; but, upon this matter of constructive possession, the claim—the mere claim—tells the whole story.

Not only does there seem to be lack of reason for holding that the deed which gives color of title must be recorded, but the decisions generally are clearly to the same negative effect. In Lea v. Polk Co., 62 U. S. (21 How.) 493, 16 L. Ed. 203, the case was evidently in the main one of constructive possession through improvement of a small part, and the Supreme Court held that the record of the deed, under which the entry had been made, was unnecessary. This was by way of construction of a Tennessee statute, but the statute did not make any specific reference to constructive possession, and the holding seems to be applicable to the general question. In Minot v. Brooks, 16 N. H. 374, the court says:

"But we are of opinion that, to the extent of the lot, there was notice enough to put any other person who made claim to that lot upon inquiry as to the extent of Brooks' claim and possession, and to charge him with notice of all that he would naturally have learned upon such inquiry; that is, with notice of an adverse possession of the whole lot. It is not necessary to make any record of such an adverse possession. The registry is not provided for that purpose, and no case has been found holding a record of such color of title necessary. Some of the language in Prescott v. Nevers, 4 Mason, 326 [Fed. Cas. No. 11,390], might perhaps be regarded as implying that a record was of some importance, but, if so, the position is not sustained elsewhere nor by the reason of the thing. The evidence of title furnished by adverse possession for 20 years, is said to be founded on a presumption of some grant or agreement, which the law raises for the quieting of possessions and titles. But this presumption of grant does not arise from the fact that the party in possession has any title on record. It exists in full force where nothing exists on the record as to the extent of the actual occupation. The color of title only extends the limits of that occupation constructively. But it is the occupation itself that furnishes the notice, and as we said before the registry is not provided to give limits to it. The actual occupation being of a character to put anyone claiming upon inquiry, he must inquire. If he does so he will be

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charged with what he actually learns. If he does not he is chargeable with notice of what he might and would naturally have learned had he done so."

In Roberson v. Downing Co., 120 Ga. 833, 48 S. E. 429, 102 Am. St. Rep. 128, 1 Ann. Cas. 757, Justice Lamar makes an extensive review of authorities and concludes that, in Georgia, a record is not important. In 2 C. J. 181, there is collected a list of decisions from ten different states in support of the same proposition. Not all of these citations are very pertinent, but some of them are; indeed, there seems to be nothing contrary save the cases which take it for granted that there should be a record, and those which more or less vaguely place dependence upon the thought that record gives notoriety.

[3] Upon both reason and authority, we conclude that in Kentucky it is not essential for the deed, which gives color of title, to be recorded while the statute is running, and that if the lack of record is of any importance, it is only because it has evidential value upon the issue whether the true owner is chargeable with notice that the disseisors claim to the full extent.

The case was decided below upon the theory or the finding that two of the five calls or boundaries of the deed were not sufficiently certain and well defined to meet the requirements of the Kentucky rule to the effect that the benefit of constructive possession up to the stated boundaries can be had only when they are well defined. The Kentucky cases say that, for this purpose, the boundaries must be natural objects or marked boundaries or well-defined boundaries. In this case, the natural objects which constitute the alleged boundary, as these objects have been recited by us, lend some force to the contention that it is complete; but they are not, of themselves, sufficient, nor is there satisfactory evidence that the line was marked in any usual way. We therefore come to the meaning of "well-defined" Just to what extent and how the line should be defined in order to be well-defined seemed to have been left in some confusion by the Kentucky decisions.

In construing patents and other grants, as between conflicting claims of title, the Kentucky courts have been extremely liberal in an endeavor to close the lines of the grant and not to permit it to fail for lack of accuracy in description. If a given course was too short to reach the place where it was expected to get, thus leaving a gap, the course was continued, or deflected and continued, until the desired location was reached and the gap was bridged; but as to boundaries which will support a constructive possession, it was held that the leaving of a gap between two calls was fatal. King v. Eagle Co., 144 Ky. 660, 139 S. W. 863.

If this and some others of the earlier cases are inconsistent with the general rule of construction, they must be thought of as overruled by Burt Lumber Co. v. Sackett, supra (see 147 Ky. 240, 144 S. W. 34). The test there was said to be whether the lines were so described that they could be run by a surveyor, and one of the boundaries in the deed there involved was the "conditional line" of a specified adjoining owner. It is the familiar and undoubted rule in Kentucky that the description in a deed is sufficiently definite when it calls for any-

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thing to serve as a monument, if that monument can be found by a surveyor by resorting to sources of information familiar in the vicinity or known to the neighborhood or otherwise open to him; and we are unable to perceive any distinction in principle between a description sufficient to identify property conveyed and one sufficient to identify property held. Only a clearly established local rule would justify this court in recognizing such a distinction.

It follows that the Roberts-Mosley deed makes a sufficient basis for constructive possession of the whole tract, if, when it was made and thereafter, it could be located upon the ground with substantial certainty by any one desiring to do so.

The description in the deed is this:

"Beginning at a conditional [line] between J. H. Bowlin and Lucy Roberts, on a chinquapin tree; thence up the point to the top of the ridge; thence with the top of the ridge to the head of the Stokley-Bowlin branch; thence with the ridge to the head of the Old House branch; thence binding on I. Mattingly's line; thence with a conditional line between C. H. Godsey and William Muncey to a water oak below Samuel Morgan's field; thence back to the beginning—containing 200 acres be the same more or less."

The first two boundaries and the last one, being those shown on the sketch map as A B, B C, and G A, everybody agrees are well-known and definitely located lines. The third boundary, that marked C D, is perfectly certain as to its course, and the chief uncertainty as to its end comes from a question as to the names of the two branches. We agree with the court below that, beyond any fair doubt, this call extends to the vicinity of the point marked D. Boundaries 4 and 5, those marked D E and E F G, are challenged. It seems to be apparent that, when the deed was made, Lucy Roberts was occupying land upon the north side of the ridge D E, claiming to the top, and Mattingly was doing the same upon the south side. I. Mattingly held under two old patents issued to his father. It does not appear whether, in 1882, they had been surveyed. Very likely Mattingly did not know where the north lines were. As they were run by defendant's surveyor and platted upon his map, the northerly line of one of them has approximately the length and course of the line D E, but is some distance south thereof. One of the north lines of the other patent, as so platted, touches the line D E, but is shorter and is not parallel. We cannot have implicit confidence in the location of these patents as thus platted. If the larger Mattingly patent is laid down upon defendant's map used on the second hearing, in the same relation to the stream there shown as is found between the same patent and the same stream in defendant's map used on the first hearing, the north line of this patent would not be far away from the line D E. However, assuming that these patent lines are as platted on defendant's map, that is not conclusive. I. Mattingly had continued to live in the neighborhood. He showed a part of this line along the top of the ridge to Mosley's surveyors, in the preparation for the first hearing, and he showed the whole line to them in the preparation for the second hearing. Defendant's surveyor, who could not find this line, purposely refrained from asking Mattingly where it was. Members of the Roberts, Mosley and Mattingly families,

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all intermarried, and no other persons, have lived upon both sides of the line ever since long before the deed was made. There is no reason to think that any one in the neighborhood had any doubt where this line was or would have failed to point it out as an old and known line to any surveyor who inquired for it.

Such uncertainty as there now is apparently only began when defendant's surveyor undertook to run out the Mattingly patents and declared the community was mistaken. Further, it appears that Henry Mosley, just before his death in 1883, made a survey and took a patent of land which was bounded on the north in part by this same ridge, and apparently had in mind that he was coming north to the existing line. Again, it seems that the Mosley family purchased this Mattingly property so as to add it to what they already had, to make a continuous tract, and in 1885 I. Mattingly made a deed to the Mosley heirs. This deed was at once recorded. Some of its stated boundaries are hard to follow, but there is no doubt that it describes a great part of the line D E, and, reversed from E, runs west along the ridge, across Muncey's creek and up and along the ridge west of the creek. It describes natural objects which make this clear, and it also says that it is "along the Mosley line." The attempt of the defendant's surveyor to superimpose this deed upon the Mattingly patents, as he has them platted, and half a mile away from the ridge, must be entirely rejected; it is not plausible. Not only does the deed on its face describe this ridge with sufficient certainty, but I. Mattingly, as a witness for defendant, says that it was intended to do so, and W. H. Mattingly, a surveyor, testifying for defendant, says that it does in fact do so. When we take the cumulative effect of the facts that Roberts and Mattingly, on respective sides, each claimed to this line, that it was offered by Roberts and accepted by Mosley as a known boundary sufficient for a deed, that it has always been known and understood in the neighborhood as the line and that it was called for and described as the existing line in a deed between the same parties a little later and 20 years before suit brought, we think it measures up to the requirements of a "well-defined" line, for the purposes now involved, and that its easterly end is definitely located at the point E.

It was distinctly held in Mosley v. Eversole, 148 Ky. 685, 147 S. W. 426, that where two adjoining occupants, neither of whom had any title, differed about their dividing line and got their neighbors to fix it for them, thus making a "conditional line," which was recognized for a long period, that became a sufficient boundary. There is not much difference between a line fixed by arbitration and one fixed by agreement or common consent. It must be remembered that we are not accepting a line thus fixed and using it for the direct purpose of divesting the title of another. While it comes to that in the end, wholly different considerations are involved. No matter if the line, up to which respective claims have been made and acquiesced in, forms a natural object, like a river, or a marked line, like a fence (and surely satisfies the rule for constructive possession), the existence of this line would not, of itself, shift the title; but here we are only seeking a definition of a term used in an established rule, and the reason for re-

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quiring a line to be well-defined is that the true owner, if, being put upon notice, he seeks to ascertain how far the color of title goes, may not be left to the mere arbitrary claim of the disseisor, but may be sufficiently informed by the deed.

The westerly end of the call for the Mattingly line is more indefinite, but its precise location is not important. The previous call follows the ridge "to the head of the Old House branch." This is not, necessarily, a definite spot. The "head of the Old House branch" may well be the summit of the ridge which bounds the headwaters of that branch, and since this ridge does, at some place in this vicinity, come to be "binding on the I. Mattingly line," the description plainly means that the ridge shall be followed till the Mattingly line is reached. This is the necessary implication from "thence"; this word purports to continue the next preceding call until it reaches the point where the line introduced by "thence" may rightly begin. It is of no importance whether that line is reached exactly at the point E or somewhere further east along the ridge.

The boundary E F G, "thence, with a conditional line," etc., presents this question: The easterly running part F G undoubtedly responds to the call and is a definite line, established by arbitrators in 1849. This was the point involved and this was decided in Mosley v. Eversole, supra. The part E F, which runs north along the summit of the ridge, was not involved in that case; but since the call to run with the I. Mattingly line is exhausted at E, it may be thought that there will be a fatal deficiency if there is no reason for following the ridge from E to F, although perhaps the Kentucky decisions would justify closing this gap by a straight line. We think that the facts, as developed in this case and as recited by the Court of Appeals of Kentucky in the case just cited (all parties seem to agree that the facts found in that case are to be considered as in this record), justify the conclusion that there is no gap. Godsey doubtless claimed the west side of this ridge, E F, as well as the land north of F G. His house was west of E F; Muncey's house was just across, east of the ridge; each was close to it.

Not only is it plain that this ridge, E F, was part of the dividing line between Godsey and Muncey, but the patent afterwards issued to Muncey's successor in interest shows that Muncey's west patent line ran south practically along this ridge, from F almost to E, or beyond E, according as to whether we move the side line south to correspond to the arbitrators' location of the north line. There is absolutely nothing to show whether those who established the east and west conditional line between Godsey and Muncey along the disputed boundary also ran this line south along the undisputed boundary. There is no particular reason why they should have done so, nor why they might not have done so; but it is plain enough that practically the entire line E F G was the existing and well-known line of 1849 between Godsey and Muncey. The only defect in the call for it in the Roberts-Mosley deed is that perhaps only part of it was "conditional." If the call had omitted this word "conditional," there would be no ambiguity (unless for a few poles), and we cannot think that referring to the line in

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that way when perhaps part of it was not conditional but undisputed, is a very substantial defect. Further, Roberts and Mosley, in 1882, evidently understood that the conditional line came to E. and Mosley testified that it did. As against this testimony, there is only the fact that in the Mosley-Eversole Case Mosley's map did not show that the line came south of F; but in that case the only litigated and the only important question was whether the line coming from the east stopped at G, or came on as far as F, and the fact that Mosley only undertook to claim and establish that part from G to F is not seriously inconsistent with his position here. In that case, he was defendant. His title to the whole boundaries of his deed by adverse possession was not very important. His defense was that the title of his opponent, Muncey's successor, did not extend north of the conditional line F G so as to reach the spot in controversy, which was immediately north of that line.

Upon the whole case, we feel bound to conclude that the boundaries named in the Roberts-Mosley deed were sufficiently well defined to make a basis for a constructive adverse possession extending to them. Actual possession thereunder, within the interference, sufficiently appears. As to the interference with the Mattingly grant, defendant, by its map and testimony, conceded on the first hearing that Mosley's old field and inclosure extended beyond the Pace patent and covered about 3 acres of Mattingly. On application for further hearing, defendant's map and affidavits showed that the Pace patent, rightly located, covered all of Mosley's fields. Upon the further hearing, defendant's map omitted to show the fields but defendant's testimony again conceded the three-acre overlap. Since no two of these three maps are wholly alike in locating the Pace patent, and such explanation as is attempted of the discrepancies is incomplete, we are inclined to accept the apparently careful location made by plaintiff's surveyors, which shows a considerably larger overlap; but this is not important. Three acres are enough. There is no proof that defendant or its predecessors did not fully understand that this extended field was within the Mattingly location.[2]

[4] As to the Sizemore interference, the case is even clearer. About 1888, the Mosley heirs cleared a field of 12 or 14 acres in the southwest part of plaintiff's boundaries, far away from the Pace patent and toward the far side of the Sizemore grant. The evidence seems to be undisputed, given by defendant's witnesses as well as plaintiffs', that this field was thereafter continuously inclosed—the fence being once rebuilt—and was in crops every other year until about 1907. In alternate years, it was used for pasture. Persistent and unbroken cultiva-

[2] Defendant's latest map of its claimed tract undertakes to run around, and, therefore, exclude, this 3-acre parcel. There is enough ambiguity in the deed to defendant to give some plausibility to this construction of its boundary, if it had originally adopted this view; but its first map and testimony committed it to the other location of its line. Its later action in changing the exterior boundary of the tract it claimed was, therefore, only a voluntary disclaimer during the trial of the parcel which the proofs had shown had been adversely occupied by Mosley. Such a disclaimer cannot be allowed to destroy any constructive possession under color of title which would otherwise be sufficient.

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tion every other year for about 20 years, while in alternate years the land rests but the inclosure is maintained, and by people living in close-by houses, fully satisfies the Kentucky standard of actual, continuous possession. A generally similar occupation appears as to a field of 6 or 8 acres in the southeast part of plaintiffs' boundary, and part of which was within the Sizemore interference. Still clearer is plaintiffs' case, if the deed of 1890, under which defendant claims, made by the owner of Mattingly and Sizemore, and which conveyed both by reference only to one outside line, is given effect to transform them into one unitary tract, as it probably does. In that event, there has been actual possession of three scattered pieces, aggregating perhaps 20 acres, all within the single interference between the claims of the two parties.

The only remaining question is whether Mosley's conduct has been inconsistent with that claim of exclusive right, up to his boundaries, which would otherwise be the natural inference from his actual possession. Several facts are said to show such inconsistency. At different times, members of the Morgan family cut timber within the northern part of Mosley's boundary. We must assume that this cutting was within certain patents to Morgan and Bowlin, and was outside of lands deeded to defendant under Mattingly, and that Mosley had never taken actual possession anywhere within the interference between himself and Bowlin, or anywhere within that part of the Morgan grant which had any valid existence as against Mattingly. It may therefore well be true (although not here involved) that Mosley had no rights which he could maintain as against this timber cutting by the Morgans, and some degree of acquiescence by him therein is not inconsistent with giving his actual possession within the Mattingly interference the full effect which it could lawfully have. The rule that actual possession must be hostile "against all the world" cannot apply to constructive possession extending to the described limit, where it comes in conflict with the Kentucky rule that this constructive possession may exist as against some interfering owners, and not as against others.

In 1908, apparently after his title by adverse possession became perfect, Mosley was cutting timber on the Mattingly interference. One who had purchased standing timber from the defendant brought suit against Mosley and recovered the value of four or five trees. This is not claimed to be an adjudication against Mosley, because of difference in parties, nor can we see that it indicates any inconsistency on Mosley's part. There was some other cutting of timber within the Mattingly interference, and without protest from Mosley, about 1901; but it does not appear that Mosley knew this was upon his side of the boundary, nor that it was important enough to require protest, considering the value of timber at that time. It is also said that Mosley pointed out the line which he claimed, at a point well beyond the Pace patent and far within his deeded boundary. He denies this, and it is not very credible. He was also at one time willing to pay a small price for a conveyance of the Mattingly title. This may well evidence prudence, rather than cowardice. Mosley's map, prepared for the Mosley-Eversole Case, shows a theory of fixing the Mattingly line somewhat different

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from his present theory; but the result was not substantially different. The question was not material to that case nor did the map cut any particular figure, so far as we are informed. The map evidences, at the most, a temporary adoption of an erroneous theory of construction, and does not estop him from adopting the right theory when it is so well established as it is in this case. He should not be penalized for saying frankly as a witness in a former case that he was not certain how the deed would be construed, nor for there saying—what was true—that he was not "in this case" claiming the whole boundary covered by the Roberts deed. Upon the whole, we think such circumstances of doubt as there are regarding Mosley's continual claim to the limits of the deed are not sufficient, as against this defendant, to overcome the legal effect of his actual and notorious occupation of at least three parcels scattered in widely different parts of the tract claimed by defendant.

We conclude that the decree must be reversed, and the case remanded for a new decree in accordance with this opinion.

(259 Fed. 118)

MINERAL DEVELOPMENT CO. v. KENTUCKY COAL LANDS CO.

(Circuit Court of Appeals, Sixth Circuit. October 10, 1918.)

No. 3104.

1. APPEAL AND ERROR ⟹231(5), 273(4)—RESERVATION OF GROUNDS IN LOWER COURT—ADMISSION OF EVIDENCE—OBJECTION AND EXCEPTIONS.
   A general objection and exception to testimony as immaterial and irrelevant is not a sufficient basis for an assignment of error on the ground that it was incompetent as hearsay.

2. APPEAL AND ERROR ⟹837(6)—REVIEW—INSTRUCTIONS.
   In reviewing an instruction the record must be considered as it was at the time of the charge to the jury, and it is immaterial to consider whether the court was right when it received evidence or right when it later struck it out.

3. BOUNDARIES ⟹37(1)—ACTION TO ESTABLISH—SUFFICIENCY OF EVIDENCE.
   A verdict finding the boundary of a grant of land from the state of Kentucky as established by an old survey *held* reached under proper instructions and supported by the evidence.

In Error to the District Court of the United States for the Eastern District of Kentucky.

Action at law by the Kentucky Coal Lands Company against the Mineral Development Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Certiorari denied 250 U. S. —, 39 Sup. Ct. 492, 63 L. Ed. —.

W. B. Dixon, of Louisville, Ky., and E. L. Worthington, of Maysville, Ky., for plaintiff in error.

Ed. C. O'Rear, of Frankfort, Ky., for defendant in error.

Before KNAPPEN, MACK, and DENISON, Circuit Judges.

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DENISON, Circuit Judge. A former phase of the question now involved was before us and is reported in Mineral Co. v. Tuggles Co., 151 Fed. 450, 81 C. C. A. 34. The present case was ejectment by the Kentucky Company against the Mineral Company. Upon the first trial of this case, a verdict was directed for defendant. The judgment entered on this verdict was reversed by this court (Kentucky Co. v. Mineral Co., 219 Fed. 45, 133 C. C. A. 151); and, upon the new trial, there was a submission to the jury and a verdict for the plaintiff. The defendant brings this writ of error. The parties will be named as they were arranged below.

Defendant traces an unbroken title to several surveys and Kentucky grants, the earliest of which were made in 1882. Plaintiff owns whatever title was conveyed by a 12,000-acre grant to Isom Stamper, made in 1848, and based upon a survey made in 1846. The whole dispute is as to the proper location of this Isom Stamper survey. If plaintiff's theory of location is correct, its title to the premises in dispute is clear. The general facts are fully stated in the opinion in 219 Fed. 45, 133 C. C. A. 151, to which reference should be made.

[1] 1. Aside from points directly involving the general merits of the case, the assignments of error present only a single question—one of evidence. It is that part of a certain deposition by Alexander Stamper should not have been received for the plaintiff. Before the first trial, the evidence of Alexander Stamper, as a witness for defendant, was taken by deposition, and the whole deposition was used by the defendant upon the trial. Before the new trial, the witness died, and the plaintiff, this time, read his deposition in evidence. Alexander Stamper was a son of Isom Stamper, who had died before this suit was commenced. A reference to the former opinion will show that the controlling question is whether the third, fourth, and fifth calls of the survey and grant run along certain ridges to Eagle Gap, or whether these lines entirely leave the ridges at a point five or six miles short of Eagle Gap. As bearing on this, it was important to locate the second and third corners. Alexander Stamper testified that his father, Isom Stamper, had, 50 years before, pointed out to him the location of these two corners. This testimony by Alexander Stamper was clearly hearsay, and it is argued that its admission was error because it did not pertain to a declaration against interest, and, therefore, was not within the exception to that general rule which forbids hearsay testimony.

We cannot consider the question thus argued. We say this, because the point was not saved by proper objection and exception. This class of testimony is excluded, not because it is irrelevant or immaterial, but because it is incompetent. Hearsay testimony is excluded because it is hearsay, and not for any other reason. It is therefore essential that, if it is to be rejected, it should be objected to for that reason. Diaz v. U. S., 223 U. S. 442, 450, 32 Sup. Ct. 250, 56 L. Ed. 500, Ann. Cas. 1913C, 1138. We find no such objection. The deposition was offered by plaintiff, and its counsel read introductory portions. When the question was asked where the corner stood that had been pointed out by the witness' father, the record says:

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"Defendant objects, and objects generally to the introduction of this testimony by plaintiff, as it is not offering this deposition, and the court has made a different ruling in this case from the other. [After a delay:] The court here rules that plaintiff may read to the jury the direct testimony of Alexander Stamper, as given in his deposition offered yesterday. Defendant excepts to this ruling."

Thereafter, as to specific questions, the record shows:

"Defendant objects, but the court overrules the objection, and the defendant excepts."

Upon this point, as to these corners, no other objection or exception was made. We have frequently held that a mere general objection is no sufficient basis for an exception or an assignment of error, and that an objection which does not direct the court's attention to any good reason therefor does not support a claim of reversible error, even though, when the case reaches this court, a good reason has been thought of. Shea v. United States, 251 Fed. 433, 163 C. C. A. 451, decided August 3, 1918, and cases cited. There might be cases where the proper ground of objection, first specified on review, would be so obvious that the reviewing court would assume it to have been in the mind of the trial court; but not so here, where the objection was based upon two reasons which were specifically stated and each of which was obviously insufficient.

The assignment of error based on the admission of this part of the Alexander Stamper deposition must be overruled.

2. While it is insisted that the intent of the surveyor, in using the language selected by him, was not a proper thing to be considered by the jury at all, it is further claimed that, if there was to be any submission, it should have been accompanied by an explanatory charge making clear to the jury the rules of law affecting the conclusion it was to draw, and that it was error to omit such explanation. If there were merit in this complaint, it should not be considered, because no exception was taken to the charge in this particular, nor was the claim that there ought to be a fuller explanation brought to the attention of the trial judge.

[2] 3. The court charged the jury that it might find for plaintiff, if it found that the third, fourth, and fifth boundaries were actually marked upon the ground along the summit of the ridge to Eagle Gap as part of the survey; and it may be that the verdict rendered for the plaintiff rests upon the theory that such marking did occur. We designate this as the theory of actual location as distinguished from the theory of constructive location, later considered. The rightfulness of this charge is attacked because defendant says there was no evidence tending to support such a theory; and the existence or absence of such evidence is therefore determinative on this point. We conclude that the judge was bound to submit the issue to the jury as he did; and, in reaching this conclusion, we wholly exclude several more or less persuasive items of evidence which the trial court received but later struck out. The record must be considered as it was at the time of the charge to the jury, and it is therefore immaterial to consider whether the court was right when he received this evidence or right when he later excluded it.

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[3] Viewing the record thus restricted, plaintiff starts with distinct and clear evidence tending to show that there was a marked line along the trees upon the summit of these ridges for the whole of the six or seven miles, as early as 1865; that several witnesses saw these marks before 1890; that at all these times, the marks appeared to be very old; that the marks on the beginning corner were of peculiar size and shape (made by a tomahawk) and the line of old marks on the top of the ridges had the same peculiar character; and that there was no other known survey which could have resulted in the marking of this line at so early a date as was indicated by the times when it was seen and its then apparent age. This testimony is to be interpreted in the light of all the circumstances hereafter mentioned tending to show that the line along the ridges was the one which the surveyor was trying to describe. If this were the entire record, it would hardly be disputed that there was enough to go to the jury to support plaintiff's theory; but defendant says that two other items of evidence destroy all its substantial basis.

The first item is that it appears that the surveying party came back from their work at the end of the day, and that there had not been time enough to run this line. This evidence, if it were wholly accepted as complete and accurate, would not be decisive. The marking of this line along the ridge did not require the services of a surveying party. The surveyor might have done it, or caused it to be done for him, at any time before he closed the transaction by signing and delivering his certificate, and there is nothing to show how much time might have intervened.

The other item is that plaintiff's surveyors, who went over the ground at a comparatively late date and who also testified to observing this old line, and that it appeared old enough to have been made before 1850, identified the trees which bore these old marks, and that, from certain ones of the trees so identified, blocks were later cut out and brought into court by defendant; and it was claimed to be thereby demonstrated, by counting the annual rings, that the marks on these trees, estimated by plaintiff's surveyors to be more than 60 years old, were, in fact, only about 30 years old, dating back from the trial in 1916. If it were to be conceded that the evidence of plaintiff's surveyors as to what they saw upon their comparatively recent trip was the strongest item of proof to support plaintiff's theory, and that this specific testimony had been wholly overthrown by the evidence of the blocks, still, this would not be decisive. There would remain the evidence of the several witnesses who say they actually saw such a marked line at a date earlier than these particular marks were made (if it is true that they were only 30 years old) and that it was then a very old line; and there would remain, also, the difficulty of attributing such an old line, if it existed before 1880, to any other survey than the one in question.

4. The conclusion that there was no error in submitting to the jury the question as to the actual marking of the line on the ground at the time of the survey does not dispose of the case, because the court submitted to the jury another theory upon which they might find

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for the plaintiff, if they found against it on the former one. This second theory was one of constructive location, to the effect that even if the line was not marked on the ground, the certificate should be interpreted as carrying the boundaries along the ridges to Eagle Gap. However, the court charged that the jury could not accept this theory unless it found as a fact that the second and third corners were located on top of the ridge. The defendant's claim in this respect was that the second and third corners, as well as the first, were in fact located at points on one or the other side of the ridge, appreciably down from the summit, and hence it inferred that this was inconsistent with the idea of a line running along the summit and would not support the running of the third, fourth, and fifth boundaries meandered along the summit. The court adopted this inference, if the fact existed. Whether this was right or was a view too favorable to the defendant, we need not consider, because if the jury's verdict for the plaintiff is based on the theory of constructive location, it must have found, with plaintiff's claim, that the second and third corners were actually marked and located upon trees at the summit of the ridge.

It is now urged that the undisputed testimony requires a finding that these locations were not on the summit, and hence that it was the jury's duty, under the charge, not to find for plaintiff on the constructive location theory. We assume, without deciding, that the actual location of these corners a few rods away from the summit would be hopelessly inconsistent with the theory that the summit is the substantial boundary, and we come to the question whether the evidence permits only defendant's interpretation. It might be enough to say that the parties in the Tuggle Case, and the parties in this case went through two trials in the court below and two hearings in this court, all conceding that the second and third corners were in fact located on the summit of the ridge. Defendant's maps and surveys used upon the first trial were made upon that theory, and no doubt of its accuracy occurred to any one until new counsel, with knowledge derived from collateral litigation, came into the case. The substance of the matter, developed on the present trial, is that neither the locations accepted by defendant on the former trial as correct, or those now presented by it as accurate, can be reconciled with the certificate of survey, except by changing either courses or distances; that there are considerations tending to support the summit theory and others tending to support the side hill theory; but that it is quite impossible to pronounce the latter established as matter of law.

5. Error is alleged because the question of intent was submitted to the jury, and it is said that the construction of such a survey or grant is a question of law for the court. Upon further consideration, we remain satisfied with the conclusion reached upon the former hearing, viz. that whether the issue be called a mixed question of law and fact or whether it be said that the construction to be drawn as matter of law depended upon inferences to be drawn as matter of fact, there were issues for the jury—apart from the question of actual location of the third, fourth, and fifth boundaries for the whole distance. If the form of submission ought to have been other than it was (which

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we do not intend to intimate), the defendant should have requested the adoption of the other form. In this connection, we should note the precise language of the court to the jury:

"The location of the boundary does not depend upon what was the actual or secret intention, if there was a secret intention of [the surveyor], as to where that line should be run; but the question is what [the surveyor] did at the time of the survey and in connection with the making of the survey to indicate where he intended that line should be. That is the ultimate fact that I am going to submit to the jury, when I come to give the court's charge to you on which the case will hang—the intention of [the surveyor] as to where that line is to be; and that intention is not his actual and secret intention, but it is his intention so far as it is disclosed by what he did at the time of making the survey and in connection with it."

However, if it were necessary to adopt as matter of law from this record the plaintiff's present theory of location or the defendant's present theory, we have no doubt that the former is the more probable and reasonable and should be chosen. The facts that Isom Stamper lived on lower Turkey creek, and that the tillable lands there were already granted to him or his neighbors; that there were ungranted tillable lands on the upper watershed of Turkey creek; that no lands, excepting immediately along the creeks, were, in that day, of any value; that it would have been the natural thing for Isom Stamper to wish to get title to the upper watershed of Turkey creek rather than to omit that and to reach out across a mountain range; that the survey and grant declare that the lands are "on Turkey creek,"[1] while defendant's theory puts the greater part on Leatherwood creek; that there was no apparent reason for leaving the described ridges until their end was reached; that the surveyor would, of course, intend to describe the territory which Stamper wished to take up; that courses 3, 4, and 5 correspond in a general way with the main bends of the described ridges; and that the distance given does not overrun the end of the ridges by any greater excess than such as is commonly overlooked in these mountain descriptions—all these things go far to produce conviction that when the surveyor said:

"Thence running the dividing ridge between Turkey creek and the Line fork to the Defeated branch; thence the dividing ridge between Defeated branch and Turkey creek"

—he meant to say, and the survey should be interpreted as saying, that his boundaries, as approximately described by course and distance, should follow the first ridge until the second was reached, and then follow the second until it was exhausted. If to these things we are permitted to add the further facts (proved or offered but later excluded) that both the surveyor and the patentee at the time of the survey declared in effect that they were running the ridges to Eagle Gap, that from 1846 until (at least) 1882 Stamper and all his neighbors supposed that the line was thus located, and made deeds as between

[1] The certificate says: "Surveyed * * * for Isom Stamper * * * 12,000 acres * * * lying on Turkey creek * * * bounded as follows." The patent grants "12,000 acres * * * lying and being * * * on Turkey creek * * * bounded as followeth." This highly persuasive fact has been ignored by defendant.

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themselves calling for this line for the boundary, and that its location never was doubted until a surveying party, anxious to establish titles in the next county, "threw the line off the mountain," little doubt will remain that the jury in this case rightfully "put it back again."[2]

6. It is apparent, from the discussion in our former opinion, from an inspection of the map there found, and from what we have here said, that the strongest reason indicating, if not compelling, the adoption of plaintiff's theory of construction is found in the facts that the description plainly contemplated the running of the line along the second ridge, that between Turkey creek and Defeated branch, as well as along the first-named ridge, that between Turkey creek and Line fork, and that, under defendant's theory of construction, the line would leave the ridges altogether and go in another direction before it had reached the second ridge at all. Upon the present trial, defendant undertook to meet this argument by proof showing that from the summit of the ridge, at about the location of the third corner or end of the second boundary, Turkey creek lay upon one side, to the west; and the valley of Defeated branch could be seen by looking in another direction; and therefore it is said that the ridge between Turkey creek and Defeated branch had then been reached, no further following the ridge was required, and verdict should have been directed for defendant.

We think this theory wholly untenable. When we observe that the surveyor certainly had in mind two successive, "dividing" ridges, one of which began where the other ended, his language can refer only to the dividing watersheds, first between Turkey creek and Line fork, and then between Turkey creek and Defeated branch. This is a continuous watershed upon the western or Turkey creek side; upon the eastern side, it is distinctly divided by a spur of the ridge, indicated on the map (219 Fed. 51), which separates the waters of Defeated branch from those of Line fork. The junction of this spur with the main ridge plainly marks the dividing point between the two successively named portions of the main ridge; and, at the location of the third corner, this dividing point is not reached by about two miles. The fact that the Defeated branch valley can be seen from this corner is fortuitous, and is because the corner happens to be high and the way to be clear. Defeated branch is about twice as far away as the Line fork, and the line of vision passes over the Line fork watershed nearly all the way.

7. It is insisted that the decision of the Kentucky Court of Appeals in Carter v. Elk Coal Co., 173 Ky. 378, 191 S. W. 294, establishes the proposition that these lines must not be run along the ridges, but must follow the stated courses. With the fullest intention to apply any rules of construction which may be settled by the Kentucky courts, we are not persuaded that this decision has this effect.

In the first place, the argument rests upon a false premise. We are confronted with the statement in the opinion in the Tuggles Case and in the former opinion in this case that these ridges are not boundaries,

[2] Language attributed to defendant's surveyor (denied by him) as to what he had done and could do to the line in dispute.

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but are aids or guides, and therefrom it is argued, in effect, that the reference to "along the ridge" must be wholly disregarded. There has been no holding to this effect. It has been held that the ridges are not boundaries in the sense that they constitute independent sides of the tract in addition to the stated course and distance lines. It has not been decided that they do not constitute an inherent part of the description of those boundaries which are approximately described by some of the course and distance lines. The thought that, in this way, they did, in effect, accurately mark the boundaries thus doubly described by course and by quasi-monument, was not involved in the Tuggles Case, but was distinctly approved in the former opinion in this case.

In the second place, we find nothing in the case stated indicating any intention to overrule the earlier Kentucky cases, referred to in our former opinion, and establishing the general principle that a line which is declared to run along a river or along a ridge, will, ordinarily, follow its meanderings instead of constituting a right line.[3] The case rather only illustrates the rule that each one of these grants must be construed according to its peculiar language, when interpreted by the topography of the country and by the monuments used. It was held that, where a line had been followed to and located at a known monument approximately where a spur joined a higher ridge, and which continued "thence down the spur" a certain course and distance to a monument which was well known and unquestionably located, the boundary should be a straight line from one monument to the other rather than one drawn along the irregular summit of the spur. The peculiar facts—as compared with those here—plainly justified, if they did not require, that conclusion. The distance was relatively short, one mile. The beginning and ending corners were actually located on the ground, instead of being left for location by force of description. The language "down the spur" was fairly, if not fully, satisfied by a line which ran from a point higher up on the spur to a point lower down thereon. It suggests only faintly, if at all, the thought which dominates the language now involved, and which in effect is "thence along the dividing ridge between two water courses until it joins the ridge between two other water courses, and thence along the latter ridge." The line approved did, in truth, run "down the spur," and its approval did not involve rejection of any descriptive words used, while the lines here, as defendant would locate them, do not run "along the dividing ridge." Carter v. Elk Coal Co. could only be made to support defendant's theory here by supposing that the description in that case

[3] To these, we may add Dupoyster v. Miller, 160 Ky. 780, 170 S. W. 182. A boundary was described as commencing at a stake in the B. & W. road, and continuing on three courses: "(1) Thence with said road N. 89° W. 38 poles to a stake; (2) thence N. 54° W. 57 poles to a stake; (3) thence S. 84° W. 90 poles to a stake in the road." The specified courses did not follow the road, but the road was held to be the boundary for the whole distance. The first course was with the road and the third course ended there. So Stamper's line began on the ridges and was again fixed there on the second ridge. There is close analogy. To the same effect is Bruce v. Taylor, 25 Ky. (2 J. J. Marsh.) 160. See, also, Brashears v. Joseph (Ky.) 108 S. W. 307, and the very interesting comments of Chief Justice Bibb in Whitaker v. Hall, 1 Bibb (Ky.) 72, 79.

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had read "thence along the ridge to the spur, thence down the spur 350 poles to a stake," and that it had been held that the line should follow stated courses and abandon the ridge long before it reached the spur at all. Further, in this case, the jury has found that (at least) part of the five-course southeasterly boundary was actually located at the time on the ridge summit.

8. It is again urged upon us that the shape of the surveyor's plat forbids the adoption of plaintiff's theory of construction. We think not. The effect of plaintiff's theory is only to change the main southern boundary (the fifth) from a course south 68 degrees west to a course about south 50 degrees west,[4] and to shorten it from 2,000 poles to about 1,800 poles.[5] If, then, the opposite boundary, the eighth, is swung correspondingly to compensate for this 18 degree variation, as is frequently approved by the Kentucky courts (or even if it is not so swung), the resulting figure is not wholly dissimilar to that shown on the plat. Nor is the fact that the surveyor's plat uses straight and not broken lines very important in the interpretation of "along the ridge." Some of the Kentucky cases which have required a boundary to follow a winding course seem to have been construing a grant where the plat showed a straight course.

9. The defendant requested the court to charge that, if there was ambiguity or uncertainty in the survey, that construction must be adopted which, consistently with the evidence, was most favorable to the defendant, and assigns error because this was not given. No exception was taken, save one in general form, to the failure to give this request. The court did charge that the burden was upon the plaintiff, and that, unless the jury found that the fifth boundary was actually located on the ground along the ridge, or that what the surveyor did and wrote showed his intent to describe the line there located, the verdict must be for the defendant; that the plaintiff must establish one or the other of these alternatives by a preponderance of evidence; and that, if the evidence left the jury with no conviction or belief in favor of the plaintiff on one or the other of these alternatives, the verdict must be for the defendant. If the charge, as thus given, was not equivalent to the charge as requested, the variance is a matter of precision of language, and not of great substance. The case is one where the trial judge apparently intended substantially to comply with the request, and where fairness requires that counsel, if they think he has not done so, should specifically and at the time call his attention to the precise addition to the charge which is desired.

The judgment is affirmed.

[4] The only witness whose testimony we observe says 53 degrees.

[5] As meandered; considerably shorter, if straight.

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(259 Fed. 127)

ROWE et al. v. KIDD et al.

(Circuit Court of Appeals, Sixth Circuit. January 10, 1919.)

No. 3072.

1. JUDGMENT ⟹654—SUIT TO REMOVE CLOUD ON TITLE—DISMISSAL ON MERITS—IMPLIED HOLDING OF POSSESSION.

Dismissal on the merits of a bill to remove cloud from title must be taken as an implied holding that plaintiffs' possession, essential to maintenance of the bill, had been sufficiently made out; as otherwise dismissal should be for want of possession, without prejudice.

2. QUIETING TITLE ⟹12(1)—NECESSITY OF POSSESSION.

Under the federal equity practice, as well as under Act Ky. July 3, 1893 (Ky. St. § 11), bill to remove cloud or to quiet title cannot be maintained without proof of possession.

3. QUIETING TITLE ⟹12(7)—ACTUAL POSSESSION—HOW SHOWN.

Under the Kentucky rule, to constitute actual possession of land one need not have a crop on it or a person living in a house, but, if he has an inclosure on it, such possession may be shown by any acts indicating his intention to hold exclusive possession of it.

4. QUIETING TITLE ⟹12(7)—ACTUAL POSSESSION—SUFFICIENCY OF SHOWING.

Plaintiffs at time of filing bill to remove cloud on title must, for the purpose of maintaining suit, be deemed to have been in actual possession of all the land within their inclosure, which was intact, though their tenant had left a few months before, after gathering his crop, and they had put no new tenant in possession; they not having affirmatively indicated intention to abandon possession, the time elapsing since the former tenant had left not warranting a presumption of abandonment, and they in their bill asserting possession.

5. QUIETING TITLE ⟹12(7)—POSSESSION, ACTUAL AND CONSTRUCTIVE.

In the absence of conflicting possession, actual possession by plaintiff in suit to remove cloud of part of the land in controversy under their deed, with claim of title to the extent of its boundaries, operates as constructive possession of the remainder; the two being sufficient for maintenance of the bill.

6. JUDGMENT ⟹675(1)—PERSONS CONCLUDED—ESTOPPEL—ASSUMING DEFENSE.

One is not estopped by judgment by assuming defense of the suit, his action in that regard not being open and known to plaintiff.

7. JUDGMENT ⟹675(2)—PERSONS CONCLUDED—ESTOPPEL—UNAUTHORIZED ANSWER.

R., grantee by unrecorded deed from A., was not estopped by judgment for plaintiff in action against A. to quiet title with warning order against R., resident of another state, though A.'s attorney without authority and unknown to R. filed answer in name of R. as well as A.; the general attorneys of R. having objected and been assured answer in R.'s name would be withdrawn, though not having seen to the carrying out of the promise, which was not done.

8. BOUNDARIES ⟹3(3)—CALLS—COURSE AND DISTANCE—EXTENDED NATURAL OBJECT.

Departure from courses and distances required to yield to a call for an extended natural object should not be greater than is reasonably necessary, and, the distance called for being exhausted, a slight and immaterial variation from the prescribed course, whereby the nearest point in the natural object can be reached, should be made, rather than to follow the course precisely and reach the natural object at a much greater distance.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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9. BOUNDARIES ⟹37(3)—RELOCATION—EVIDENCE.
Under evidence in suit to remove cloud from title, *held*, that a surveyor's location of the patent, under which defendants claimed, carried out, generally, the intent of the original surveyor, the cardinal object of inquiry.

10. QUIETING TITLE ⟹10(2)—SHOWING OWNERSHIP.
Under the Kentucky statutes, plaintiff in bill to quiet title to succeed must prove ownership in himself; any weakness of defendant's title not being enough.

Appeal from the District Court of the United States for the Eastern District of Kentucky; Andrew M. J. Cochran, Judge.

Suit by I. W. Rowe and another against Pinkie Kidd and others. Bill dismissed (249 Fed. 882), and plaintiffs appeal. Affirmed.

J. B. Snyder and H. C. Gillis, both of Williamsburg, Ky., for appellants.

Wm. Waddle, of Somerset, Ky., for appellees.

Before KNAPPEN and DENISON, Circuit Judges, and SANFORD, District Judge.

SANFORD, District Judge. This suit, which was before us at an earlier stage sub nom. Rowe v. Hill (215 Fed. 518, 132 C. C. A. 30), was brought by the plaintiffs, I. W. Rowe and wife, citizens of West Virginia, by a bill in equity against citizens of Kentucky, of whom Pinkie Kidd, hereinafter called the defendant, is the real party in interest, to remove an adverse claim as a cloud upon the plaintiffs' title to a tract of land in Wayne county, Ky., of the requisite jurisdictional value.

The plaintiffs claim title under various patents issued to one Alexander between 1880 and 1885. The defendant claims under a patent issued to one Mills in 1858, which, being senior to the Alexander patents, is admittedly superior thereto in so far as it may be properly located within their boundaries. By a previous judgment of the circuit court of Wayne county, Ky., affirmed by the Court of Appeals of Kentucky (Alexander v. Hill, 108 S. W. 225, 32 Ky. Law Rep. 1148), and relied on by the defendant as a bar to the present suit, the location and extent of the Mills patent was adjudged in accordance with the defendant's present contention.

The court below, after a hearing on pleadings and proof, being of opinion that the plaintiffs were estopped from denying the location of the Mills patent as adjudged in said former suit, and that in any event it would not be justified in deciding the matter differently from the state courts, dismissed the plaintiffs' bill. Rowe v. Hill (D. C.) 196 Fed. 910.

On appeal to this court we held, however, that the plaintiffs were not bound by the judgment in said former suit or estopped from contesting the location and boundaries of the Mills patent as therein determined; and that the record, which contained evidence not in said former suit, did not bring the case within the rules of law announced therein or justify us in locating the Mills patent as therein adjudged. Having, however, doubt whether the plaintiffs had shown the pos-

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session of the land in controversy essential to the maintenance of a bill to remove cloud from title, and without undertaking to determine the true location of the Mills patent under the confused and unsatisfactory evidence in the record, we reversed the decree dismissing the plaintiffs' bill, and remanded the case for further proceedings, with the direction to the court below to reopen the case for further proof, not only as to the question of the plaintiffs' possession and title, but also as to the location and extent of the Mills patent, the judgment in the former suit, and all other issues in the case. 215 Fed. at pages 522, 524, 526, 132 C. C. A. 30.

The case was again heard in the court below, partly upon evidence introduced at the former hearing, including depositions in the former suit, and partly upon additional testimony orally given. Upon this hearing, the court below held that, in accordance with the rules stated in the opinion of this court, the plaintiffs were not estopped by the judgment in the former suit as to the location of the Mills patent, but that nevertheless the decision of the Court of Appeals of Kentucky therein should be accepted as prima facie correct and followed unless error was clearly made to appear; and, concluding after a comprehensive view of the evidence and analysis of the authorities, that no error appeared in its location of the Mills patent, again entered a decree dismissing the plaintiffs' bill, with costs. Rowe v. Kidd (D. C.) 249 Fed. 882. From this decree the plaintiffs have again appealed to this court.

[1, 2] 1. *Plaintiffs' Possession.*—Although at the last hearing below the attention of the court was directed to this question by the defendants' motion to dismiss the bill upon the ground that the plaintiffs had shown no possession of the land in controversy, this was not referred to in the opinion of the court or any specific ruling made thereon. The dismissal of the bill upon the merits must, however, we think, be taken as an implied holding that the plaintiffs' possession had been sufficiently made out, since otherwise the bill should have been dismissed for want of such possession, without prejudice. It is well settled, as we formerly stated, that under the federal equity practice, as well as under the Kentucky Act of July 3, 1893 (Ky. St. § 11), a bill in equity to remove cloud from plaintiffs' title, or, as it appears to be called in the Kentucky practice, a bill to quiet title, will not lie where the plaintiff is not in possession of the premises, and cannot be maintained without proof both of possession and legal title. 215 Fed. at page 524, 132 C. C. A. 30, and cases cited. Much additional proof was taken on the last hearing in reference to the plaintiffs' possession. While in some respects conflicting and obscure, it nevertheless, in our opinion, sufficiently establishes the following facts. About seven years before the commencement of the plaintiffs' suit, Alexander, their vendor, made and fenced in for occupation by tenants a house and clearing, containing about five acres, and lying within one of his patents covering part of the land in controversy. The house and greater part of this clearing were outside of the Mills patent, as claimed by the defendant; but the fence and a portion of the actual clearing, including a substantial part of an acre, extended within its

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boundaries. The deed from Alexander to the plaintiffs, dated in 1903, united the Alexander patent, on which this clearing lay, with other contiguous patents, in one tract, described by outer boundaries. The plaintiffs, after their purchase from Alexander, continued to keep up this house and clearing by tenants placed thereon for the purpose of holding possession. Their last tenant apparently left it in the fall of 1907, after gathering his crop. They commenced this suit in January, 1908. At that time a new tenant had not been put in possession, and the house was then unoccupied and the clearing uncultivated. The fence was, however, still standing; and there is no evidence that they intended to abandon the possession. Some time in the spring of 1908, the fence burned, leaving no inclosure; and since that time the house has not been occupied or the clearing cultivated.

[3-5] Under the Kentucky rule in order to constitute the actual possession of land, it is not necessary that one should have a crop upon it or a person living in a house; but, if he has an inclosure upon it, such possession may be shown by any acts indicating an intention on his part to hold exclusive possession of it. Everidge v. Martin, 164 Ky. 497, 503, 175 S. W. 1004, and cases therein cited. At the time the plaintiffs' suit was commenced, while they had placed no new tenant in possession, their inclosure still remained intact; they had not affirmatively indicated an intention to abandon their possession and sufficient time had not elapsed since the former tenancy to warrant a presumption of such abandonment; and, on the contrary, they asserted possession of the premises in the averments of their bill. Under these circumstances, regardless of whether under the authority of the Kentucky cases it would be necessary, in order to establish the defense of adverse possession, to show, after the expiration of the former tenancy, acts indicating affirmatively an intention to continue the possession, we conclude that, at least for the purpose of maintaining their suit, they must be deemed to have been in actual possession at the time their bill was filed of all that portion of the land claimed by the defendant which lay within their inclosure.

On the other hand, the defendant has failed to show, by the greater weight of the proof, that any part of the land in controversy was then in her actual possession. While the testimony as to this matter is likewise obscure and conflicting, we conclude that the house then in her possession, and on which she relies, was not inside of the Mills patent claimed by her, but stood, as definitely located by the plaintiffs' witness Blakeman, a skilled and accurate surveyor, by running the course and distance from the beginning corner, outside of that patent and upon another tract of land.

In the absence, therefore, of any conflicting possession by the defendant, the plaintiffs' actual possession of part of the land in controversy under their deed from Alexander, with claim of title to the extent of its boundaries, operated constructively as a possession of the whole tract. Everidge v. Martin, 164 Ky. at page 502, 175 S. W. 1004; Taylor v. Lumber Co. (Ky.) 109 S. W. 348, 349. And see Parsons v. Dills, 159 Ky. 471, 475, 167 S. W. 415. However, under a statute similar to that in Kentucky, a bill to quiet title may be main-

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tained upon an actual possession of part of the land in controversy and constructive possession of the remainder, if vacant and unoccupied. Roberts v. Northern Pacific Co., 158 U. S. 1, 30, 15 Sup. Ct. 756, 39 L. Ed. 873. The plaintiffs must therefore be held to have shown, under all the circumstances, such possession of the land in controversy, actual and constructive, as was necessary to maintain their bill.

[6, 7] 2. *Estoppel.*—The court below correctly held that under the rules stated in our former opinion (Rowe v. Hill, 215 Fed. at page 521, 132 C. C. A. 30) the plaintiffs were not estopped from contesting the location and boundaries of the Mills patent as adjudged in the former suit in the state court to which they were not parties. In addition to the authorities cited in our former opinion on the point that the plaintiffs were not bound by such former judgment even if Alexander had made defense to the suit both for himself and them in pursuance of an understanding and agreement with them, since his action in that regard was, in any event, not open and known to the other party, and the estoppel by reason of assuming the defense of a suit must, as in other cases, be mutual, see also, to the same effect: Bigelow v. Copper Co., 225 U. S. 111, 126, 32 Sup. Ct. 641, 56 L. Ed. 1009, Ann. Cas. 1913E, 875, and Helm v. Zarecor (D. C.) 213 Fed. 648, 654; and, by implication, Souffront v. La Compagnie Des Sucreries, 217 U. S. 475, 487, 30 Sup. Ct. 608, 54 L. Ed. 846, and Cushman v. Paving Co. (7th Cir.) 220 Fed. 857, 860, 135 C. C. A. 289. The case presented is entirely different from that in Re Dashiell (6th Cir.) 246 Fed. 366, 158 C. C. A. 430, in which it was held that one who caused litigation to be instituted through another, intentionally and actively submitting his interest to the consideration of the court and inviting its decision thereon, is estopped to question such decision as against the party whom he induced to institute the litigation. Nor does the evidence on the second hearing confirm our former suspicion that the plaintiffs might perhaps have participated in the defense of the former suit, either by Alexander or by attorney, by and under the answer filed therein in the name of "J. W. Rowe," thereby misleading the present defendant, the plaintiff in the former suit, as to the identity of the purchaser from Alexander, and in consequence becoming estopped from denying their identity with "J. W. Rowe" and bound by the judgment rendered in such suit as if they had actually been parties. Rowe v. Hill, 215 Fed. at page 521, 132 C. C. A. 30. While the proof shows that I. W. Rowe, and probably Hannah Rowe, knew generally of the pendency of the former suit, it does not show that they authorized Alexander or any one else to make defense for them in the name of "J. W. Rowe," or otherwise, or that they knew that an answer had been filed in such name. And on the contrary it affirmatively shows that this answer was filed by Alexander's attorneys, merely on the presumption that he was authorized to file a joint answer, and that when the attorneys who represented the plaintiffs generally in their land matters, but who had not been employed in this particular suit, discovered that such answer had been filed they stated to Alexander's attorneys that they would have nothing to do with de-

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fending the suit and requested that this answer be withdrawn and were assured that this would be done; upon which assurance they relied. It is clear that, in the absence of any action taken either by the plaintiffs or their attorneys to mislead the present defendant in the former suit, the mere fact that such attorneys did not follow up the matter and see that the answer filed in the name of "J. W. Rowe" was actually withdrawn, in accordance with the assurance given them by Alexander's attorneys, did not work an estoppel against the plaintiffs binding them by the judgment rendered in the former suit.

[8] 3. *Location of the Mills Patent.*—The question of the location and boundaries of the Mills patent has presented great difficulty. The survey was made and patent issued in 1858. Both described the tract as containing 100 acres. The description in the survey, which is substantially followed in the patent, is as follows:

"Being and lying in the county of Wayne on the waters of the Big South fork and bounded as follows, to wit: Beginning at a poplar; running S. 55 E. 200 poles to a stake at the river cliff; N. 40 E. 40 poles to a stake; N. 50 W. 200 poles to a stake; N. 21 E. 40 poles to a stake; N. 20 W. 60 poles to a stake at the river cliff; S. 80 poles to a stake; N. 70 W. 10 poles to a stake; S. 45 W. 20 poles to a stake at the river cliff; N. 10 E. 60 poles to a stake on Thomas Ryan's line; thence with said line N. 85 W. 60 poles to a stake on said line; S. 71 W. 40 poles to a stake on Isaac Foster line; S. 33 E. 150 poles to J. W. Mills' corner a pine; thence with Mills' old line to the beginning."

The Kentucky Court of Appeals adopted as the true location of this patent that established by one Stanfill, a surveyor; and the map filed by him was made the basis of the judgment of the court. This location has been again adopted by the court below. According to this location the patent contains about 700 acres. In the former suit the Kentucky Court of Appeals, having first found that the beginning corner had been correctly located by Stanfill and that the Thomas Ryan, Isaac Foster, J. W. Mills corner, and Mills old line were "well-known and established" at the time of the Mills survey in 1858, thereupon held that the courses of the patent should be changed and the distances extended so as to reach the river cliffs and such lines and corner, under the "well-settled" law that "where there is a conflict between the course and distance and recognized objects establishing the boundary lines of a survey, course and distance must yield and the natural objects and established boundaries of other tracts called for, and designated known points therein must be accepted as the true boundary of the land in question." Alexander v. Hill, 108 S. W. at page 228. 32 Ky. Law Rep. at page 1150. This rule was subsequently approved and followed in Rock Creek v. Hill, 162 Ky. 324, 327, 172 S. W. 671, and recognized as an established general rule in Albertson v. Veneer Co., 177 Ky. 285, 299, 197 S. W. 831. On the former appeal we were of opinion that while, in so far as the principle of law on which this decision was based had become a rule of property in Kentucky, it should be followed by this court, if applicable to the facts then in evidence, we were not then justified in locating the boundaries of the patent in accordance therewith for the reason that the evidence then before us, which was not the same as that formerly before the state

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courts, did not show that either the Ryan, Foster, or old Mills line or the J. W. Mills corner were "well known and established" in 1858 when the Mills patent was surveyed. Rowe v. Hill, 215 Fed. at page 523, 132 C. C. A. 30. We were further of opinion that the evidence then before us did not bring the case within the rule stated in Morgan v. Renfro, 124 Ky. 314, 99 S. W. 311, and Brashears v. Joseph, 108 S. W. 307, 310, 32 Ky. Law Rep. 1139, 1143, that, in locating a patent, "calls for the lines of other patents which are of record and which are susceptible of definite and certain location" are to be preferred to course and distance; a rule which was also subsequently approved and followed in Rock Creek Co. v. Hill, 162 Ky. at page 327, 172 S. W. 671, and recognized as an established general rule in Albertson v. Veneer Co., 177 Ky. 293, 197 S. W. 831. In the record formerly before us, there was no copy of either the survey or patent of the Ryan or Foster tracts and no proof of any recorded survey or patent of the tract which the defendant claimed to have identified as the old J. W. Mills tract. Rowe v. Hill, 215 Fed. at page 524, 132 C. C. A. 30.

On the last hearing, however, the defendant introduced in evidence a copy of a patent issued to Thomas Ryan in 1857, which was admitted to have been correctly located by Stanfill, and which was sufficiently identified by the proof as the Ryan tract whose line was called for in the Mills patent; also, a copy of the patent issued to Isaac Foster in 1855, which was likewise admitted to have been correctly located by Stanfill; also, a copy of a survey made by Robert Parmley in 1849 upon which a patent issued in 1851, which was owned by Mills at the time of his survey in 1858, which contained a "three pines" corner that has been definitely located and sufficiently identified by the proof as the J. W. Mills "pine" corner called for in the Mills patent, and a line of which is sufficiently identified as the "Mills old line" likewise called for in the Mills patent. It furthermore now appears from the opinion of the court below that it has never been disputed in this case, but always frankly conceded, that the lines of the Thomas Ryan and Isaac Foster survey were "well known and established" when the Mills survey was made, and that it was because of this that no pains were taken on the former hearing to introduce the certificates of survey and patents in evidence. Rowe v. Kidd, 249 Fed. at page 889.

The additional evidence thus offered by the defendant on the last hearing, and the concessions thus made, obviously go far to supply the deficiencies in the record in the former case and make applicable to the facts now before us, as a controlling principle, the rule of law stated by the Kentucky Court of Appeals in the former suit; and being reluctant to differ from that tribunal in a decision affecting the title to real estate within the borders of the state, unless necessarily constrained thereto, and also having in mind the weight attaching to the opinion of the learned trial judge in the court below, who heard the oral testimony of the witnesses upon most of the crucial matters in controversy, we find no sufficient reason now justifying us in reaching a different conclusion on the merits from that concurrently reached by the Kentucky Court of Appeals and the court below. It is true

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that Stanfill's map, which was made the basis of the judgment of the Kentucky Court of Appeals, is inartificially prepared, showing neither the points of the compass, courses nor distances, and that it incorrectly indicates in places the location of the river and river cliff, especially in the neighborhood of the Ryan tract, where both are shown much further to the west than they are actually located. However, we find none of its omissions or inaccuracies to be fatal to the substantial correctness of its location of the Mills patent as adopted by the courts.

In view of the elaborate consideration given in the opinion of the court below to the various objections urged against the correctness of Stanfill's location, we do not deem it necessary to set out at length the reasons leading us to our present conclusion, involving in the main a consideration of detailed facts appearing in the opinion of the court below; and shall refer merely to some of the more important matters. Stanfill's location of the poplar beginning corner we again find to be supported by the greater weight of the evidence. Rowe v. Hill, 215 Fed. at page 522, 132 C. C. A. 30. We also find that he correctly located the "stake at the river cliff," at the end of the first line of the patent, at the point at which he placed a stone corner. That this corner is on the river cliff is shown not only by the testimony of Stanfill and other witnesses for the defendant, but is also in our opinion established by the facts stated in the testimony of the plaintiffs' witness Blakeman, in whose accuracy we have confidence, as well as by his map, from which it appears that it is located on the main river cliff at the apex of an inward bend which it makes from its usual course parallel with the river bank. And while this corner is 410 poles from the poplar beginning corner, instead of 200 poles, as called for in the patent, it is the nearest point in the river cliff which can be reached in the general course south 55 east from the beginning corner. It is true that, if this line were run with due allowance for the intermediate variation of the magnetic needle from the true meridian (Bryan v. Beckley, 16 Ky. Litt. Sel. Cas. 91, 93, 95, 12 Am. Dec. 276), it would pass about 125 feet southwest of the stone corner established by Stanfill, and, by reason of the deflection in the line of the cliff, it further extended in the same direction, would reach the cliff at a point 585 poles from the beginning corner. We are of opinion, however, that in such case, where the course and distance must yield to the call for an extended natural object, the departure from course and distance should not be greater than is reasonably necessary, and that where, after the distance called for is exhausted, the nearest point in such natural object can be reached by a slight and immaterial variation from the prescribed course, such deflection should be made so as to reach the nearest point in such natural object, rather than to follow the course precisely and reach the natural object at a much greater distance. See, by analogy, Morgan v. Renfro, 124 Ky. at page 324, 99 S. W. 311, as to reaching the nearest point in the line of a known survey. We further find that Stanfill correctly stopped the third line of the patent at the end of the 200 poles called for, instead of extending it a total distance of 410 poles so as to correspond to the extension that

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had been made in the first line. Assuming that the rule stated in Cornett v. Coal Co., 175 Ky. 718, 727, 195 S. W. 149, and other cases, that a known error in an established line may be offset by a corresponding change in the opposite line, so as to close the survey, would otherwise apply where, as in the present case, the supposed "opposite" line varies in its course five degrees from the first line, it nevertheless, in our opinion, cannot be properly applied here for the conclusive reason that to extend the third line to a total distance of 410 poles would not aid in closing the survey, but would lead further away from the river cliffs and the Ryan tract called for in the subsequent lines and make it impossible to close the survey in reasonable conformity thereto. And while it is true that the cliffs located by Stanfill at the end of the fifth and eighth lines are not, in our judgment the main river cliffs, which, under the great weight of the proof, lie a mile or more to the east of these points, they are nevertheless cliffs branching out from the main river cliffs and running up the tributary creeks, and a subsidiary part of the general system of river cliffs which may well have been called river cliffs at that time and so designated by the surveyor.

[9] Without referring further to the details of Stanfill's location of the Mills patent, we are of opinion that it carries out, generally speaking, the intent of the original surveyor, which is the cardinal object of inquiry. Kentucky Lands Co. v. Development Co. (6th Cir.) 219 Fed. 45, 55, 133 C. C. A. 151, and cases cited. And see Mineral Development Co. v. Lands Co. (6th Cir.) 259 Fed. 118, 170 C. C. A. 186, October 10, 1918. It begins on the poplar corner called for, and extends on the southeast to the river cliffs, on the east to the Ryan tract, on the north to the Foster tract, and on the west to the old J. W. Mills tract, and includes, as was apparently intended, the main body of the unoccupied land then lying between these natural objects and various tracts. And while under this location the patent includes about 700 instead of 100 acres, such discrepancy in acreage is merely one of the evidences of intention, and was not regarded by the Kentucky Court of Appeals as a sufficient objection to Stanfill's location. On the whole, we now conclude that this location is in substantial accord, not merely with the conclusion reached by the Kentucky Court of Appeals in Hill v. Alexander, which is of paramount weight in our consideration of the case, but also with the opinion in Rock Creek Co. v. Hill, 162 Ky., supra, in which a patent calling for 150 acres was located so as to include 500 or 600 acres; and that the court below was justified in locating the Mills patent in accordance with these cases. We are not unmindful of the fact that in Bryant v. Strunk, 151 Ky. 97, 101, 151 S. W. 381, and Albertson v. Veneer Co., 177 Ky. at page 293, 197 S. W. 831, it was held that when the lines of a survey were evidently not actually run but simply laid down by the surveyor by protraction, as in the present case, the general rule that courses and distances must yield to natural objects and established boundary lines does not apply when it is evident that the call for such objects and lines was made by the surveyor under the mistaken belief that they existed at certain points when in fact they were not at such points, and that in

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such case the original plat made by the surveyor is potent evidence in determining the location of the tract intended to be patented. The plat accompanying the Mills survey does not appear to have been actually introduced in evidence on the hearing below and is not in the record before us. The Kentucky Court of Appeals stated in its opinion in the former suit that Stanfill's location carried out in the main the distinguishing features of this plat. 108 S. W. at page 228, 32 Ky. Law Rep. 1150. The court below, to whom the plat appears to have been at least exhibited, states merely that Stanfill's location departs radically from the plat at its northwestern end. 249 Fed. at page 888. Blakeman in his testimony stated that the original plat was the same as a plat made by him by plotting the courses and distances given in the survey. This being so, it would appear that the original plat, which was evidently made in this manner and not by an actual location of the lines upon the ground, corresponds, in its general outlines, otherwise than as to acreage, with the location shown in Stanfill's map, except, as stated by the court below, in its northwestern end. On the whole, therefore, we conclude that we are not justified, on this account merely, in departing from the location of the patent established by the Kentucky Court of Appeals in the former suit.

It is true that in some of the details of Stanfill's location, especially after passing the third line, there may be minor inaccuracies. However, it does not appear from the proof that such inaccuracies, if any, are prejudicial to the plaintiffs; nor have they in their evidence furnished sufficient details as to the precise location of the various objects called for, to enable such inaccuracies, if any, to be corrected, and a more accurate location made; having, as pointed out by the court below, contented themselves in the main merely with criticisms of the location as made by Stanfill. 249 Fed. at page 907. We hence find no prejudicial error in the decree of the court below so far as the same involved the location of the Mills patent in accordance with the judgment of the Kentucky Court of Appeals in the former suit.

[10] 4. *Mesne Conveyances.*—In various mesne conveyances in the chain of title from the patentee Mills to the defendant calls are omitted from the descriptions in the patent, so changing the boundaries that if these conveyances are located in accordance with their exact descriptions, the defendant has deraigned title to only part of the land contained in the original patent. We need not determine whether these mesne conveyances should be corrected so as to supply the omitted calls and convey all of the land included in the patent, for the reason that, even if not so corrected, the result is that the title to all portions of the patent not included in the chain of mesne conveyances will be now outstanding in the defendant's vendors. This would authorize the dismissal of the plaintiff's bill as well as proof of title in the defendant, since under the Kentucky statutes the plaintiff in a bill to quiet title as in an action of ejectment, to be entitled to a recovery, must prove ownership himself. Patton v. Stewart, 173 Ky. 220, 223, 190 S. W. 1062. And for the same reason, it is immaterial whether, as the plaintiffs insist, the deed to the defendant is void for champerty,

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in whole or in part, by reason of adverse possession by the plaintiffs or their vendor.

5. The decree of the court below dismissing the plaintiffs' bill, with costs, will hence be affirmed. The plaintiffs will pay the costs of the appeal.

(259 Fed. 137)

LEHIGH VALLEY R. CO. v. SCANLON.

(Circuit Court of Appeals, Second Circuit. February 13, 1919.)

No. 157.

1. MASTER AND SERVANT ⟹286(33)—EMPLOYERS' LIABILITY ACT—NEGLIGENCE.
In action under Employers' Liability Act (Comp. St. §§ 8657–8665), evidence that plaintiff switch tender was injured by a freight engine just after passing through a string of cars which, contrary to a posted rule, etc., obstructed his passageway, made defendant's negligence in not providing a safe passageway, a jury question.

2. NEGLIGENCE ⟹101—EMPLOYERS' LIABILITY ACT—CONTRIBUTORY NEGLIGENCE.
In action under the Employers' Liability Act (Comp. St. §§ 8657–8665), plaintiff's contributory negligence does not defeat his cause of action, but only decreases the damages.

3. MASTER AND SERVANT ⟹286(33)—EMPLOYERS' LIABILITY ACT—JURY QUESTION.
In action under Employers' Liability Act (Comp. St. §§ 8657–8665), evidence that a freight engine was unexpectedly operated without warning on a track next to which stood a string of cars through which it was known plaintiff switch tender would have to pass to perform his duties, *held* to make defendant's negligence in so operating the freight engine a jury question.

4. MASTER AND SERVANT ⟹137(6)—EMPLOYERS' LIABILITY ACT—NEGLIGENCE.
Ordinarily it is not negligent for a switching engine in a railroad yard not to give warning by bell or whistle to employés familiar with the operation of the yard.

5. MASTER AND SERVANT ⟹286(33)—EMPLOYERS' LIABILITY ACT—JURY QUESTION.
In such case, evidence *held* to make defendant's negligence, in not keeping a lookout on the engine, a jury question.

6. MASTER AND SERVANT ⟹217(29)—EMPLOYERS' LIABILITY ACT—ASSUMPTION OF RISK.
An employé does not assume a risk due to the negligence of his fellow employés, unless he is aware of it, or the risk is so obvious that an ordinarily prudent person would know and appreciate it.

7. MASTER AND SERVANT ⟹288(3)—EMPLOYERS' LIABILITY ACT—ASSUMPTION OF RISK.
In action under Employers' Liability Act (Comp. St. §§ 8657–8665), evidence that plaintiff switch tender was injured by a freight engine just after passing between a string of cars which obstructed his passageway, etc., *held* to make his assumption of risk a jury question.

8. MASTER AND SERVANT ⟹289(30)—EMPLOYERS' LIABILITY ACT—CONTRIBUTORY NEGLIGENCE.
In action under Employers' Liability Act (Comp. St. §§ 8657–8665), evidence that plaintiff switch tender was hit by a freight engine just after passing between a string of cars which obstructed his passageway, etc., made his contributory negligence a jury question.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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In Error to the District Court of the United States for the Western District of New York.

Action by John W. Scanlon against the Lehigh Valley Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Kenefick, Cooke, Mitchell & Bass, of Buffalo, N. Y. (James McCormick Mitchell, of Buffalo, N. Y., of counsel), for plaintiff in error.

Henry W. Brush, of Buffalo, N. Y., and A. G. Newcomb, of Cleveland, Ohio (Henry W. Brush, of Buffalo, N. Y., of counsel), for defendant in error.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. The defendant in error, while in the employ of the plaintiff in error, a railroad corporation engaged in interstate commerce, was injured on the 10th of December, 1915, and has maintained this action successfully below, recovering damages for a substantial sum. The plaintiff in error maintains a large freight yard at Sayre, Pa., where it has an extensive and complicated system of storage, classification, and switching tracks.

The defendant in error sustained his injuries in what was known as the lower yard, which is approximately 200 feet south of the Sayre depot. The tracks at this point run generally in a northerly and southerly direction, but looking toward the north there is a considerable curve. There are east-bound yards and west-bound yards, with which the defendant in error had to do, and with which we are concerned; one lying partly toward Waverly, in the state of New York, and partly toward Sayre, in Pennsylvania. In other words, the yards cross the state lines.

The defendant in error had been employed in various capacities since 1889 in the service of the plaintiff in error, and since November, 1913, as a switch tender in the yard in question. There was a switch tender's shanty located between the express track and storage track, wherein there was installed a telephone. Engines upon east-bound passenger trains were changed at Sayre, and one of the duties of the defendant in error was to superintend this change of engines. Engines intended for relief of the east-bound trains were placed upon the scale track, and it was the duty of the defendant in error to switch the retiring engine on the various crossovers to the roundhouse, and then make secure the switches to the main track, so that through trains could be operated thereon safely. It was also his duty to go to and from the switch tender's shanty, using the telephone to speak with the next station, Athens, there to learn of the location of the west-bound trains destined for the Sayre yards, and to arrange by telephone as to their disposition upon arrival. Thus, in the regulation of the traffic, he was frequently obliged to pass over the tracks to and from the shanty. There were located immediately in front of the switch tender's shanty, and between it and the east-bound main track, two switch tracks, one known as the express track, and the other as a scale track, over which he was obliged to pass. It appears that for some time there was a sign on the outside of the shanty reading as follows:

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"To All Concerned: Never permit cars in front of this shanty at any time, as the telephone is here, for the convenience of yardmasters, conductors, and trainmen."

For some days previous to the day of his casualty, there was maintained upon the scale track adjacent to the shanty, a train of cars without an opening between them, and this made it necessary for the defendant in error to mount and cross over the cars whenever he desired to cross the railroad track in the performance of his duty. The defendant in error spoke to the yardmaster, Schaeffer, calling his attention to this condition, and also to Miller, the conductor of the coach crew, and to Fitzgerald and McCabe, all men in authority, complaining of the conditions, and received promises that this inconvenience would be removed.

On the morning of December 10th, while the defendant in error was putting a relief engine on the north end of the scale track, approximately at the point marked "clearance post," Cafferty, a yard conductor in charge of an engine hauling a carload of horses, came down in the direction of the depot upon the east-bound freight leader, which is the track immediately east of the west-bound main train, left his engine, and told defendant in error that he wanted to get across in the hill track before No. 8 train came in. The defendant in error then said, "You won't be coming back"? to which Cafferty replied, "No; we will stay in the clear over there," and the defendant in error stated "Go ahead." Cafferty, in making this maneuver of the car containing the horses, pulled the string of cars from the scale track and placed them on the express track, but did not make a cut or opening in front of the shanty, and left them in such a position that they blocked the pathway of the defendant in error to and from the shanty. After train No. 8 had come in and gone, and the defendant in error had fulfilled his duties in regard to it, he saw a freight train coming in the yard from the south. It became his duty then to inform the west-bound yard by telephone and secure a track for this train. He climbed over the cars, thus upon the express track blocking his passage to the shanty, and called up the west-bound yard. As he went across the tracks to meet the incoming freight train, he was again obliged to mount the string of cars which blocked the track. He did so, mounting between the bumpers of two of the cars, passed over, turned, and slowly dismounted, with his back to the yard and his face to the cars. As he reached the ground between the express track and the scale track, he says he looked south, where he last saw McCafferty with his engine, to see if he could see anything of him, and then turned to look north upon the main track, to see if the milk train was approaching thereon, whereupon he was struck by Cafferty's engine, which, unseen by him, left its position far to the south of where he was, proceeded north, and was now returning south along the scale track, tender first, without warning of its approach by bell or whistle. He was struck and run over by the engine, receiving the injuries for which he sues.

The District Judge submitted the question of the negligence of the plaintiff in error to the jury, submitting to them, first, was the plaintiff in error negligent in failing to provide and keep a suitable passage-

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way from the switch shanty to the main track? and, second, was there negligence in failing to give a warning of the approach of the engine after the conductor, Cafferty, told him that the engine would remain on the hill track in the clear? and, third, was there negligence in failing to have some one aboard the engine as it approached and passed adjacent to the shanty, who occupied a position for observation of persons crossing the track so as to give warning of its approach? The court also submitted the question of the assumption of risk of the defendant in error and that of his contributory negligence to the jury.

[1-4] The District Judge, in submitting the question to the jury, permitted the jury to find the plaintiff in error negligent in failing to exercise reasonable care in supplying the defendant in error with a reasonably safe place to work, upon the theory that the way to and from the shanty to the main track was a place for him to work in the performance of his duty, and the failure to provide an opening in the cars adjacent to the shanty, thus requiring the defendant in error to mount upon the coupling or bumpers of the cars to pass over the tracks, was a violation of a duty owed to the defendant in error. While the language of the charge is broad, we find no justification for the complaint of the plaintiff in error in thus submitting this issue to the jury. To violate the rule posted on the shanty, which was promulgated by the plaintiff in error, might be found by the jury to be negligent, and the failure to provide a passageway, thus rendering it hazardous for the employé, making possible the only other alternative, namely, to mount the cars and thus cross the tracks, provided the defendant in error with an unsafe way to pass in the performance of his obligations.

Since this action is maintained under the federal Employers' Liability Law (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. §§ 8657–8665]), a violation of the rule referred to by any employé would be negligence for which the master would be responsible. Indeed, in the absence of a rule forbidding the standing of cars on the tracks adjacent to the shanty, since it was the obligation of the defendant in error to pass across the tracks in going to and from the shanty, it was the duty of his employer, the plaintiff in error, to provide reasonable way of access to it, such as would avoid the hazards of mounting upon the bumpers of the cars. The fact that the cars which blocked the passageway were moved that morning from the scale track to the express track would not relieve the plaintiff in error from responsibility. The passageway, in either case, was blocked, and this was a direct violation of the rule sought to be enforced by the plaintiff in error. It was the duty of the plaintiff in error to use reasonable care to so conduct its business as not to subject its servants to unnecessary danger in the prosecution of their work, and to guard against accidents in the performance of his work, which, in the exercise of reasonable care, could be foreseen and guarded against. Union Pacific Co. v. Hadley, 246 U. S. 330, 38 Sup. Ct. 318, 62 L. Ed. 751; Maguire v. Barrett, 223 N. Y. 50, 119 N. E. 79; Del Sejnore v. Hallinan, 153 N. Y. 274, 47 N. E. 308.

We are of the opinion that this negligent act was a proximate cause of the accident. In order that it may be said to be the proximate cause,

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we believe the obligation to mount the cars, cross the bumpers, and then descend upon the opposite side, with his face toward the car holding on the grabiron, may well be said to be what ordinarily or probably caused the injury to defendant in error, resulting from a neglect of duty which the jury has charged against the plaintiff in error. St. Louis Terminal Co. v. Schuerman, 237 Fed. 2, 150 C. C. A. 203. Nor can it be claimed that the plaintiff in error is absolved from blame because the defendant in error was negligent in surmounting the blockade in the manner he attempted. If the negligent act of the plaintiff in error concurred with the negligent act of the defendant in error and contributed as a cause to his injury, the effect of the federal Employers' Liability Act eliminates this element of proximate cause. Spokane R. R. Co. v. Campbell, 217 Fed. 524, 133 C. C. A. 370. In other words, contribution by negligent act on the part of the defendant in error in bringing about his injury does not defeat his cause of action under the Employers' Liability Act, but only lessens the damages, and if the negligent act on the part of the plaintiff in error be established, the statute cannot be nullified by calling the act of the defendant in error the proximate cause and thus defeat it. Negligence of the plaintiff in error was an efficient concurring proximate cause of the injury, and makes the plaintiff in error liable, even though there may be other efficient concurrent proximate causes. Sweet v. Perkins, 196 N. Y. 485, 90 N. E. 50.

We think the facts here fully justified the court in submitting this charge of negligence to the jury. Further, under the circumstances disclosed by this record, we believe the District Judge was required to submit to the jury the claim of negligence in failing to give some warning of the approach of the yard engine while passing on the track parallel with the blocked track over which the defendant in error passed while mounting the cars. Ordinarily there is no obligation upon the part of the operator of a switching engine, constantly engaged in moving to and fro in a railroad yard, to give warning by ringing the bell or sounding a whistle for the purpose of notifying employés who are familiar with the operation of the yard. Aerkfetz v. Humphreys, 145 U. S. 418, 12 Sup. Ct. 835, 36 L. Ed. 758. But here it cannot be said that the operation of the engine was under ordinary circumstances. Cafferty knew of the duties of the defendant in error, and he knew the track was blocked. He secured permission to take a carload of horses on the east-bound freight leader, as indicated, and stated he would keep in the open on the hill track. Having changed his maneuver, and while proceeding north from the hill track, the immediate parallel track to the express track, he should have given some warning of his approach. For this neglect, the employer was responsible. Colasurdo v. Central R. R. of N. J. (C. C.) 180 Fed. 832, affirmed 192 Fed. 901, 113 C. C. A. 379. At least, the jury would be justified in saying that operation under these circumstances was not the usual and ordinary moving to and fro of a freight engine in a freight yard.

In making this last maneuver with his engine, Cafferty came north, not only without the knowledge of the defendant in error, but came in between No. 8 and the milk train and across the path to the shanty,

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where he knew the defendant in error would be likely to pass at any time in the performance of his duties.

[5] The further act of negligence, which the court by its charge permitted the jury to find, was that there was negligence in the failure of some one on the locomotive, proceeding with tender first, to assume a place for observation, either on the cab or tender, so as to take heed of, or give warning to, any person crossing the tracks. From the record it appears that nobody in charge of the engine and tender was on the lookout for dangers ahead. It undoubtedly was the duty of the engineer to keep a continuous and careful lookout on the track ahead of his engine at all times, while his engine was in motion. The safety of any person lawfully upon or near the tracks demanded this, and the jury could charge the employés of the plaintiff in error with neglect for failure in this regard. It appears that the engineer was at the engine cab across from the side where the defendant in error was struck, and therefore could not see the defendant in error stepping down from the cars, which he was obliged to mount in making his way from the shanty. Cafferty was riding on the pilot of the engine in a place where he could not see the defendant in error. No one was looking on the side where the defendant in error was struck. While there was no duty on the part of the railroad company to maintain a lookout ahead of the engine while proceeding in the yard ordinarily, still, because of the special circumstances here, due to Cafferty's statement that the engine would remain in the clear, and then shortly thereafter changing the movement, the jury could say the defendant in error should have had a warning signal. Cafferty's knowledge that there was no passageway left on the express track, together with these circumstances required greater watchfulness on his part and that of the engineer.

[6, 7] Nor can we say that the defendant in error assumed the risk as a matter of law. An employé, maintaining a cause of action under the federal Employers' Liability Act, does not assume a risk attributable to the negligence of his coemployés until he is aware of it, unless the risk is so obvious that an ordinarily prudent person in his situation would know and appreciate it. Erie v. Purucker, 244 U. S. 320, 37 Sup. Ct. 629, 61 L. Ed. 1166. While the defendant in error may be said to have known that it was wrong for the other employés to violate the rule in failing to keep a passageway between the cars, thus to afford him a way to go to and from the points he was obliged to reach in the performance of his duties, we cannot say, as a matter of law, that he appreciated the danger, nor can we say that he was obliged to stop in the performance of his duties, particularly since he had received some promises to remedy the conditions as they existed. It is not the obviousness of a physical situation or condition which makes out a case of assumed risk; it is the obviousness of danger which the physical condition or situation produces. Seaboard Air Line v. Horton, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475; Larson v. N. E. R. R. Co., 223 N. Y. 14, 119 N. E. 92.

[8] The District Judge, as he was obliged to do upon this record, submitted the question of contributory negligence to the jury as a

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question of fact. Its apportionment of damages indicated an intelligent consideration of this question. We think no error was committed in refusing to charge the defendant in error with guilty contributory negligence as a matter of law.

Judgment affirmed.

HOUGH, Circuit Judge (concurring). A railway man, experienced both in his work generally and as to the locality of performance, was injured because, while descending from a car at rest, he projected the posterior portion of his body into the path of a moving engine tender on the next parallel track. The descent aforesaid was necessary, because the still train to which the car belonged had not been "split" at the point where the workman wished to cross the track. This failure to keep open a path across said track was in contravention of the "sign" mentioned in the court's opinion. In addition to the quoted words, that sign concluded with the legend "By Order of Committee." But what committee framed it, or what connection it had with the railroad company's management, is unknown on this record. The engine whose tender struck plaintiff below, had gone to the other end of the yard from about the place of accident, and it came back unexpectedly, though the conductor had told plaintiff it would not.

On these facts we hold a verdict justified which in effect declares that the employing railroad was negligent in failing to supply a safe place to work, and for letting the engine come back on the track next the one plaintiff was climbing across; also that plaintiff did not as matter of law assume the risk of being hit in the manner described.

Probably there are not and never will be two accident claims that cannot be distinguished; something can always be suggested and called a question of fact; but whether any real difference exists depends upon the standard of care adopted by the court—to divide matters sufficiently debatable for the jury from those so certain as to be reserved for the judge.

The present standard in this circuit seems to me this: If the ingenuity of counsel can suggest anything done or omitted by an alleged tort-feasor, which, if differently performed or not omitted, would have prevented injury, the opinion of the jury may be taken as to the causal connection between such omission or commission and the proven physical hurt. In effect there is no standard other than that created by each jury for its own immediate use.

While this condition was developing, I could not agree with the court, but further dissent would be mere faction, after our recent decisions, of which a few are New York, etc., Co. v. Vizvari, 210 Fed. 118, 126 C. C. A. 632, L. R. A. 1915C, 9; Alpha Co. v. Curzi, 211 Fed. 580, 128 C. C. A. 180; New York, etc., Co. v. Thierer, 221 Fed. 571, 137 C. C. A. 295; Ramsdell v. Goumis, 228 Fed. 864, 143 C. C. A. 262; Lehigh, etc., Co. v. Kilmer, 231 Fed. 628, 145 C. C. A. 514; Penn., etc., Co. v. Groves, 231 Fed. 663, 145 C. C. A. 549; New York, etc., Co. v. Salkaukus, 238 Fed. 778, 151 C. C. A. 628; Schunnemunk Co. v. Sbaratta, 239 Fed. 716, 152 C. C. A. 550; Penn., etc., Co. v. Skerman, 247 Fed. 269, 159 C. C. A. 363.

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The reasoning from causes to effects, and the views as to normal human responsibility for one's own acts, contained in the decisions cited, amply support the result in this case, to which, as fairly representing ruling authority in the Second circuit, I perforce agree.

(259 Fed. 144)

CENTRAL R. CO. OF NEW JERSEY v. SHARKEY.

(Circuit Court of Appeals, Second Circuit. February 13, 1919.)

No. 130.

1. COMMERCE ⟹27(8)—EMPLOYERS' LIABILITY ACT—"INTERSTATE COMMERCE."
A car repairer, hit by a locomotive in a railroad yard while carrying bolts to repair a car used in interstate commerce, *held* engaged in "interstate commerce," within the Employers' Liability Act (Comp. St. §§ 8657–8665.)
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

2. APPEAL AND ERROR ⟹204(2), 237(2)—RESERVING GROUNDS FOR REVIEW—EVIDENCE.
Where no objection was offered, exception taken, or motion to strike out made, it cannot be urged upon appeal that certain evidence was inadmissible because hearsay.

3. MASTER AND SERVANT ⟹265(4)—EMPLOYERS' LIABILITY ACT—BURDEN OF SHOWING EMPLOYMENT IN INTERSTATE COMMERCE.
Evidence that a car repairer in a New Jersey railroad yard had been told that a Pennsylvania railroad car, which he had been instructed to repair, was "a rush car for Philadelphia," etc., *held* to make a prima facie showing that the car was employed in interstate commerce, within the Employers' Liability Act (Comp. St. §§ 8657–8665).

4. MASTER AND SERVANT ⟹286(32)—EMPLOYERS' LIABILITY ACT—NEGLIGENCE.
In action under Employers' Liability Act (Comp. St. §§ 8657–8665), evidence that plaintiff car repairer was injured by a locomotive operated at a rapid rate of speed for a railroad yard, that it was hidden behind a smoke screen and gave no warning of its approach, etc., *held* to make defendant railroad's negligence a jury question.

5. NEGLIGENCE ⟹101—EMPLOYERS' LIABILITY ACT—CONTRIBUTORY NEGLIGENCE.
Plaintiff's contributory negligence does not bar his right to recover under the Employers' Liability Act (Comp. St. §§ 8657–8665), but only diminishes the amount of his damages.

6. MASTER AND SERVANT ⟹288(3)—EMPLOYERS' LIABILITY ACT—ASSUMPTION OF RISK.
In action under Employers' Liability Act (Comp. St. §§ 8657–8665), evidence that plaintiff car repairer was hit from behind by rapidly approaching locomotive, while avoiding an engine proceeding in the opposite direction on another track, etc., made his assumption of risk a jury question.

7. MASTER AND SERVANT ⟹219(1)—ASSUMPTION OF RISK—OBVIOUS DANGERS.
Plaintiff assumes the risk of negligence upon the part of his fellow employés, if the danger be so obvious that an ordinarily prudent person would have observed and appreciated it.

8. APPEAL AND ERROR ⟹272(2)—RESERVING GROUNDS FOR REVIEW—EXCEPTION.
An exception to the refusal to grant a requested instruction, taken after the jury had retired, presents no question for review.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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In Error to the District Court of the United States for the Southern District of New York.

Action by Cornelius Sharkey against the Central Railroad Company of New Jersey. Judgment for plaintiff, and defendant brings error. Affirmed.

The action is brought under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. §§ 8657–8665]) to recover for personal injuries sustained by defendant in error, hereinafter called plaintiff, as a result of an accident which occurred on August 25, 1917, in the yards of the plaintiff in error, hereinafter called defendant, at Bayonne, N. J. The defendant is a corporation organized and existing under the laws of the state of New Jersey, and is engaged in interstate commerce, and the plaintiff was in the defendant's employ at the time of the accident. The nature of plaintiff's employment and the facts connected with his injury are stated in the opinion.

At the close of the plaintiff's case a motion was made by defendant to dismiss the complaint, which motion was denied. The motion was renewed at the end of the whole case, when it was similarly denied. The plaintiff has recovered a verdict in the sum of $7,800, and judgment has been entered in the sum of $7,842.39.

De Forest Brothers, of New York City (Henry L. De Forest, of New York City, of counsel), for plaintiff in error.

Edward J. McCrossin, of New York City (Vine H. Smith, of New York City, of counsel), for defendant in error.

Before ROGERS and MANTON, Circuit Judges, and LEARNED HAND, District Judge.

ROGERS, Circuit Judge (after stating the facts as above). The question presented to the court in this case is whether upon the facts shown the plaintiff was engaged in interstate commerce at the time he received the injuries of which he complains. At the time of the accident and for two years prior thereto the plaintiff was employed by the defendant as a car repairer in its Bayonne yards. His repair work in general was done on freight cars which he said "went to other states and came from other states." He was asked as to his work on the day of the accident, "Do you know of your own knowledge that these freight cars, which you worked on from day to day and on the day of this accident, went to other states and came from other states?" And to this he answered without objection, "Yes, sir."

On the morning of the accident the plaintiff, according to his story, began his work by bolting up a coupling on a car of the Pennsylvania Railroad which had been placed upon the repair track for that purpose. After he had been working a half hour at this job, his boss stopped him and sent him out to the part of the defendant's premises known as the West Eighth Street freight yard to inspect incoming cars in place of the regular inspector. He also told him, if he received any letters, he was to take them to another repairer who would tell him what to do. He received the letters and delivered them as he was directed. He was then asked:

"Q. Did he say anything to you? A. He told me to go and get some bolts whenever I finished at the West Eighth Street yard and take them to Twenty-Second street.

"Q. To do what with them? A. To repair this car.

"Q. What car? A. This Pennsylvania car. * * *

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"Q. Did the man that you took orders from there in the absence of McTernan say anything about the car? A. *Yes; he told me she was a rush car to go out.*

"Q. *A rush car to go out?* A. *Yes.*

"Q. *He didn't say where it was bound to or anything?* A. *He said Philadelphia; that is all I know about it.*"

The McTernan above referred to was the plaintiff's boss. The plaintiff relied on these facts as showing that his boss had deputized another employé to instruct him as to what he was to do on his return from his work of temporary inspection, and that the person so deputized told him to get certain bolts and repair a certain car, because it was a rush car for Philadelphia. At the time of the accident he had finished his work of inspection in the West Eighth Street yard, had gotten the bolts, and was going back with them on his shoulder to repair "the rush car for Philadelphia," walking in the space between the two railroad tracks, when he was hit from behind by an engine moving in the same direction in which he was going.

[1] So far as the question whether he was at the time engaged in interstate commerce is concerned, it must be answered in the affirmative, if his account of the facts is believed. There is no difference in principle between the state of facts which he testifies to and the facts in Pedersen v. Delaware, Lackawanna & Western Railroad Co., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153. In this case the man was carrying bolts to repair a car used in interstate commerce. And in the Pedersen Case the man was carrying bolts to repair a bridge used in interstate commerce.

[2, 3] But upon the argument in this court and in his brief counsel for the defendant stated that "the idle remark" made to the plaintiff by the deputized boss that, after finishing in the West Eighth Street yard, he was to go back to the yard from which he came and make repairs on the rush car for Philadelphia, was without any probative force whatever, and that the defendant's records would have been the very best evidence, and that McTernan, the boss, "was right in court all the time, if it had been desired to question him." It appears, however, that no objection was made in the court below to the admission of this testimony, and no exception was taken to it. It may be conceded that this statement made to the plaintiff that the car was destined for Philadelphia was hearsay testimony, and not made in the performance of any duty which required the party who made it to inform plaintiff as to the destination of the car. The person who made the statement which the plaintiff was allowed to repeat should have been himself called to testify that the car was destined for Philadelphia. But as no objection was offered, and, no exception taken, and no motion to strike out was made, it is too late now to say that the testimony was inadmissible and could not be considered by the jury. In Schlemmer v. Buffalo, Rochester & Pittsburg Railway Co., 205 U. S. 1, 27 Sup. Ct. 407, 51 L. Ed. 681, the Supreme Court held that statements of a witness, although based on hearsay, constitute evidence in a cause unless reasonably objected to as hearsay. See Wightman v. Campbell, 161 App. Div. 49, 52, 146 N. Y. Supp. 666, affirmed 217 N. Y. 479, 112 N. E. 184, Ann.

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Cas. 1917E, 673. But the New York Court of Appeals has held otherwise in Dayton v. Parke, 142 N. Y. 391, 37 N. E. 642.

But this hearsay testimony now objected to is not all the testimony there is to show that the car was an interstate car. The plaintiff testified that the car he was on his way back to repair was the car he had been at work upon when he was called off to go to the West Eighth Street yard. And when asked what car that was he testified that it was a Pennsylvania Railroad freight or box car, and that it had "Pennsylvania Railroad" on it. And at another time in the course of his testimony he was asked whether he had any idea what car it was he was working on and had left unfinished when he was called to go and inspect cars at the West Eighth Street freight yard, and he had replied, "She was a Pennsylvania car." And on cross-examination he was asked how he knew that the freight cars he worked upon came from outside of the state of New Jersey and went outside of the state of New Jersey, and he replied, "I seen it on the sides of the cars, a Pennsylvania." Then followed:

"Q. Now, this car that you were working on, you say, in the morning after McTernan came to you, you say that was a Pennsylvania Railroad car? A. Yes sir.

"Q. You mean that was a Pennsylvania Railroad car; is that right? A. Yes, sir.

"Q. Belonged to the Pennsylvania Railroad? A. Yes, sir."

The statement that there was a car belonging to the Pennsylvania Railroad on the repair track does not prove that the car was at the time engaged in interstate commerce, it is true; but the presence of such a car on such a track may not be devoid of some significance, in view of the order that the plaintiff was to work on "a rush car for Philadelphia." We think all this, taken together, was sufficient in the first instance at least to meet the initial burden which was on the plaintiff to show that he was employed in interstate commerce. It then became the duty of the defendant to overcome it and show the contrary. In Pittsburgh, C., C. & St. L. Ry. Co., v. Glinn, 219 Fed. 148, 150, 135 C. C. A. 46, the Circuit Court of Appeals in the Sixth Circuit declared that, where the facts show the case may well have been within the statute, the initial burden is satisfied, and it is for the defendant to show the contrary.

The defendant, to counteract this testimony called McTernan, the plaintiff's boss, and asked him if, by looking at his records, he could tell the number of Pennsylvania Railroad cars on that repair track on August 25, 1917, which was the day of the accident. And the witness in reply said that there were two—one a gondola car (meaning a coal car), and another which was repaired by the night men. The records disclosed no other. But the testimony of McTernan, conceding it to be true, does not show that the plaintiff's testimony is false, for the chief statistical clerk of the defendant, who testified that he kept in his office a record of all foreign cars that were received, was asked and answered as follows:

"Q. What I understand you to say is that, if a car is taken off a train and put on this repair track and some minor repair done to it, and it is then put back onto a train track, you would have no record of that? A. No; we would not."

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And the deputized boss, who told the plaintiff that he was to finish the rush job for Philadelphia, and who was the defendant's own employé, was not put upon the stand to contradict the plaintiff's testimony.

In Minneapolis & St. Louis Railroad Co. v. Winters, 242 U. S. 353, 37 Sup. Ct. 170, 61 L. Ed. 358, Ann. Cas. 1918B, 54, the injury occurred while the plaintiff was repairing an engine. The engine had been used in interstate commerce before the injury, and was so used afterwards; but there was nothing to show that it was permanently or specially devoted to such commerce, or assigned to it at the time, and it was held that the case was not within the federal Employers' Liability Act. And it is said that the Winters Case requires us to reverse the instant case. But this is to overlook the fact that there is evidence in this record, received without objection and exception, that this plaintiff at the time of the injury was in the state of New Jersey and on his way to complete in that state repairs on a car which belonged to the Pennsylvania Railroad and which was "a rush order for Philadelphia." It is not necessary to comment further upon this phase of the case. But we may remark that in the Winters Case the engine which was repaired was not used at all for three days following the accident, and that the court in its opinion proceeded on the ground that no interstate movement was immediately in contemplation at the time when the repairs were made. And in Great Northern Railway Co. v. Otos, 239 U. S. 349, 36 Sup. Ct. 124, 60 L. Ed. 322, the Supreme Court held that a car coming from another state, and whose interstate movement is arrested to permit repairs fitting it to reach its destination, is not by reason of such delay withdrawn from interstate commerce.

[4] It is said, however, that this case must be reversed, because the plaintiff has not shown any negligence on the part of the defendant. We are unable to take any such view of the case. If the story told by the plaintiff was believed by the jury, and their verdict shows that they did believe it, negligence was proven. The jury, and not the court, are triers of the facts. The plaintiff testified that at the time of the accident he was walking in a space between two tracks, and that this space was about four feet wide; that as he was walking along he saw a train coming towards him; that he looked behind him to see whether anything was coming from that direction on the other track, and seeing nothing he kept close to that track to avoid suckage from the engine approaching him, fearing that the suckage might pull him in with the air; that he kept on walking straight ahead; that as the train approaching him rushed past him he turned around a second time, and looked on the track behind him and saw nothing but smoke; that the smoke was very heavy and thick, and he could not see through it; that he walked about three feet, when he was hit by the engine coming on the track behind him, and which was going fast; that he heard no bell rung and no whistle blown.

In Aerkfetz v. Humphreys, 145 U. S. 418, 12 Sup. Ct. 835, 36 L. Ed. 758, the injury occurred in a railroad company's yard, when an employé working on one of the tracks therein was run over and injured by a freight car moved by a switch engine. The court declared that—

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"The ringing of bells and the sounding of whistles on trains going and coming, and switch engines moving forwards and backwards, would have simply tended to confusion."

The doctrine thus stated is to be understood in the light of the circumstances of that case. The plaintiff who was repairing a track, never looked for the approaching train, although there was nothing to obstruct his vision, and the switch engine was backing the cars toward him very slowly; the speed of the engine "being about that of a man walking." Under the circumstances as they existed in that case there was no negligenge in failing to ring a bell or blow a whistle. But we do not understand that the court meant to lay down the doctrine that under no circumstances could it be negligence if an engine in a railroad yard failed to blow its whistle or ring its bell. In Colasurdo v. Central Railroad of New Jersey (C. C.) 180 Fed. 832, 835, the learned District Judge declined to apply the doctrine of the Aerkfetz Case to the case before him, stating that he did—

"not think that as matter of law there was no negligence in operating in a freight four cars under their own impetus, after dark, without warning and without light."

The case was brought to this court where it was unanimously affirmed. 192 Fed. 901, 113 C. C. A. 379. And see Lehigh Valley Railroad Co. v. Scanlon, 259 Fed. 137, 170 C. C. A. 205, decided by this court at this term.

We are of the opinion that the evidence in the instant case is such as to make it distinguishable from the Aerkfetz Case. If the smoke was so dense that one could not see through it, we cannot say as a matter of law that it was not negligence for an engine to run in a freight yard at a fast rate of speed and without warning. And in this connection it should be said that the defendant's engineer in the instant case, who operated the train which struck the plaintiff, testified that the path upon which the plaintiff was walking when he was hit was one used by hundreds of persons, and that he knew that fact, and that it was matter of common knowledge. He also said that because of that fact he had the bell of his engine ringing at the time. In this he was contradicted by others than the plaintiff. The engine which struck the plaintiff was burning bituminous coal, and the engine of the other train was burning either bituminous or a mixture of that and hard coal, as was shown by the admission of the witness called by the defendant. Under the circumstances the jury had the right to believe the plaintiff's testimony that the smoke was so thick as to obscure his vision, and that under the circumstances there was negligence. There was evidence that the engine was driven at a rate of speed which was fast for a railroad yard, and that it was hidden behind a smoke screen, and was operated without warning.

[5] If the plaintiff was negligent, and his negligence contributed to the injury, it did not bar his right under the act to recover, but simply diminished the amount of his damages in proportion to the amount of his negligence. U. S. Compiled Statutes, 1916, Annotated, vol. 8, § 8659. The jury was correctly instructed upon that subject.

[6, 7] At the conclusion of the case the defendant moved to dismiss

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the complaint, on the ground that the plaintiff had assumed the risk of the injuries sustained. This the court denied, and there was no error in so doing. It cannot be said that upon the testimony in this record the plaintiff has assumed the risk as matter of law. But the court charged on that subject as follows:

"The railroad company does not owe to an employé in a railroad yard that same degree of care that would be required of it in respect to a passenger upon its trains, or in or about its station. A railroad yard in its very nature is a more or less dangerous place, and those who engage in work in such places assume some risk; and I instruct you that by his employment in the yard Sharkey assumed the ordinary and usual risks incident to and inherent in his employment. He did not, however, assume the risk of negligence upon the part of his fellow employés. If the negligence of his fellow employés, and they representing the company, was the proximate and inducing cause of his injury, the plaintiff is entitled to recover, provided you find that the plaintiff and defendant were engaged in interstate commerce."

The charge in this particular is open to objection. To charge that an employé does not assume the risk of negligence upon the part of his fellow employés is too broad a statement. The rule is stated in Erie Railroad Co. v. Purucker, 244 U. S. 320, 37 Sup. Ct. 629, 61 L. Ed. 1166. The facts in that case were somewhat similar to the facts in this case. The action in that case was to recover for causing the death of a section hand, who at the time of the accident was walking on one of the tracks of the railroad when he was struck and run over by an engine. The man testified that he had no warning and did not see the approaching engine, owing to steam from a passenger train which had just passed on another track. In holding that it was not error to refuse to charge that the man assumed the risk and danger of using the tracks by going upon them as he did, the court said that the request—

"failed to take into account the undisputed testimony that the engine ran into Marietta (the section hand) without signal or warning to him. Under such circumstances the injured man would not assume the risk attributable to the negligent operation of the train, if the jury found it to be such, unless the consequent danger was so obvious that an ordinarily prudent person in his situation would have observed and appreciated it."

In the instant case no exception at the time was taken to that portion of the charge relating to assumption of risk. But after the jury had retired counsel for defendant said:

"Mr. Rees: I desire to except to your honor's refusal to submit the following questions to the jury, previously submitted: Did the accident happen as the result of one of the risks assumed by the plaintiff—that is, one of the chances that the plaintiff took—which was either inherent in the work in which he was engaged, or was so open and obvious to him that he appreciated or should have appreciated the dangerous risk therefrom?

"The Court: I think I have covered that sufficiently in my charge to the jury.

"Mr. Rees: Exception."

[8] It appears that defendant's counsel took a number of exceptions to the charge at the close of the charge and prior to the retirement of the jury. At no time was any exception taken to that portion of the charge which dealt with assumption of risk. The exception above re-

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ferred to was not, in form at least, an exception to the charge. It was an exception to a refusal to charge, and an exception which was made after the jury had been sent out to deliberate upon the verdict. The common-law rule requires exceptions to instructions or to refusal to instruct to be taken at the trial to be available, and to be taken before the retirement of the jury. In Hickory v. United States, 151 U. S. 303, 316, 14 Sup. Ct. 334, 339 (38 L. Ed. 170), the court, speaking through Chief Justice Fuller, declared that—

"The rule in relation to exceptions to instructions is that the matter excepted to shall be so brought to the attention of the court before the retirement of the jury as to enable the judge to correct error, if there be any, in his instructions to them, and this is also requisite in order that the appellate tribunal may pass upon the precise question raised without being compelled to search the record to ascertain it."

And see Miller & Lux v. Petrocelli, 236 Fed. 846, 852, 150 C. C. A. 108; Alverson v. Oregon-Washington R. & Nav. Co., 236 Fed. 331, 334, 149 C. C. A. 463; Coal Co. v. Calausky, 222 Fed. 664, 138 C. C. A. 188; Copper River & N. W. Ry. Co. v. Heney, 211 Fed. 459, 128 C. C. A. 131; Northern Central Coal Co. v. Milburn, 205 Fed. 270, 123 C. C. A. 450; Brent v. Lilly Co. (D. C.) 202 Fed. 335; Johnson v. Garber, 73 Fed. 523, 19 C. C. A. 556.

This court has repeatedly held that exceptions to a charge taken after the jury has retired are improperly reserved and cannot be considered. Park Bros. v. Bushnell, 60 Fed. 583, 9 C. C. A. 138; Commercial Travelers' Accident Co. v. Fulton, 79 Fed. 423, 24 C. C. A. 654; Berwind-White Coal Co. v. Firment, 170 Fed. 151, 95 C. C. A. 1; Mann v. Dempster, 179 Fed. 837, 103 C. C. A. 325; Star Co. v. Madden, 188 Fed. 910, 110 C. C. A. 652. An exception to a refusal to charge, taken after a jury has retired, can have no greater efficacy than an exception to the charge itself could have.

The exception to the refusal to instruct as requested on assumption of risk, not having been taken until after the jury had retired, cannot now avail.

Judgment affirmed.

LEARNED HAND, District Judge (concurring). It does not seem to me that the name "Pennsylvania Railroad," upon the car, was any evidence that the car was at the time engaged in interstate commerce. Furthermore, I do not think the correctness of the charge upon the assumption of risk is involved in the case, and express no opinion that it was too broad. Otherwise I concur.

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(259 Fed. 152)

SAMPLINER v. MOTION PICTURE PATENTS CO. et al.

(Circuit Court of Appeals, Second Circuit. February 3, 1919.)

No. 13.

1. TRIAL ⟹148—SUBMISSION OF ISSUES—REQUESTS.
   Where plaintiff's counsel, on both parties moving for a directed verdict, contended there were no jury questions, denial of his motion to submit issues of fact, "if any there be," to the jury, does not constitute reversible error.
2. TRIAL ⟹177—MOTION FOR DIRECTED VERDICT—EFFECT.
   If both parties request a directed verdict, issues of fact need be submitted to the jury only where there are controverted questions of fact upon which the court has not made findings pursuant to submission by the parties.
3. APPEAL AND ERROR ⟹859—SCOPE OF REVIEW—WRIT OF ERROR.
   Findings of fact are not reviewable on writ of error, as only questions of law are open.

In Error to the District Court of the United States for the Southern District of New York.

Action by Joseph H. Sampliner against the Motion Picture Patents Company and others. A judgment for defendants (243 Fed. 277) was affirmed (255 Fed. 242, 168 C. C. A. 202). On application for rehearing. Denied.

Rogers & Rogers, of New York City (Gustavus A. Rogers and Saul E. Rogers, both of New York City, John G. White and C. A. Neff, both of Cleveland, Ohio, and Joseph Walker Magrauth and Nathan Frankel, both of New York City, of counsel), for plaintiff in error.

Seabury, Massey & Lowe, of New York City (Samuel Seabury, William M. Seabury, and Frank De R. Storey, all of New York City, of counsel), for defendants in error Smith and Vitagraph Co. of America.

George F. Scull (Robert H. McCarter, of Newark, N. J., of counsel), for defendants in error Thomas A. Edison, Inc., Dyer, and Pelzer.

Coudert Bros., of New York City (Samuel Seabury and Charles B. Samuels, both of New York City, of counsel), for defendants in error Berst and Pathé Frères.

Charles F. Kingsley, of New York City, for defendants in error Motion Picture Patents Co., Kennedy, Marvin, and Biograph Co.

Gifford, Hobbs & Beard, of New York City (Alfred P. W. Seaman, of New York City, of counsel), for defendant in error Kalem Co., Inc.

Dwight McDonald, of New York City, for defendant in error Waters.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

ROGERS, Circuit Judge. An application is made for a rehearing in this case. The application must be denied, and in denying it we shall state the ground of the application and the reason for denying it.

In our original decision we held that the plaintiff was not entitled to recover, inasmuch as at the conclusion of the trial both sides had

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moved for the direction of a verdict, and the court, acceding to the request, had found as a fact that the plaintiff purchased this cause of action with intent to sue thereon. That, having been found as a fact, was decisive of the case, because the law in our opinion does not permit an attorney to maintain a cause of action which he has purchased from his client with intent to sue thereon.

The plaintiff, however, now applies for a rehearing, and contends that the trial court had no legal authority to make any finding of fact at all. It appears that after the defendants closed their case their counsel moved for the direction of a verdict on the ground that the plaintiff had not shown title to this cause of action, and also "on the ground that it now affirmatively appears from the evidence in this case that the agreement under which the plaintiff assumed to bring this cause of action is champertous and void."

Thereupon counsel for the plaintiff asked whether the court cared to hear argument and was told that he did not, as he had examined the brief on both sides and studied the case with great care. Then there followed at some length a colloquy between court and counsel, only a portion of which need now be stated:

Mr. Rogers, counsel for the plaintiff, said:

"If your honor is going to grant the motion for a direction of a verdict, I will take a formal objection to it; but my request is that, if your honor is going to find for the defendant, it be a nonsuit to the plaintiff's cause of action. I think that is as far as your honor can go."

He also said:

"But, your honor, I submit there aren't any questions of fact on which to go to the jury. I submit the matter is purely a matter of law for your honor to determine, and I think the question whether the agreement is or is not champertous is one of law for the court."

Thereupon the following occurred:

"The Court: Well, Mr. Rogers, you may either rest on the motion of the defense and take an exception to such ruling as I make, if it should be adverse, or you can ask to go to the jury. That is entirely for you to determine.

"Mr. Rogers: Well, if there are any questions of fact to be disposed of, your honor, I ask to go to the jury upon the questions of fact.

"Mr. Seabury: I think he should specify, and not put a hypothetical motion.

"The Court: I cannot have any 'ifs.' If you think, under section 973 of the Code, the court has no right to make a direction, and you are right about it, you will have a good exception; if, on the other hand, the court is right, your exception will be addressed, not to the question of practice, but to the substantive questions in the case.

"Mr. Rogers: Then, your honor, may I state my position on the record?

"The Court: Yes, certainly.

"Mr. Rogers: The defendant having moved for a direction, in order to preserve the plaintiff's rights, I beg leave to state my position on the record with the permission of the court.

"My understanding is that the question is one of law, to be passed upon by the court from the facts adduced. If, however, it is necessary, in order to preserve the plaintiff's rights, that I make a request to go to the jury, I ask to go to the jury upon the question as to whether or not the plaintiff took an assignment of the cause of action thereon, and whether the assignment to him was bona fide for an antecedent indebtedness.

"The Court: The court cannot take conditional offers. Counsel is at liberty, if so advised, to request to go to the jury, and the court will rule.

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"Mr. Rogers: Then I move for a direction, your honor, for the plaintiff, upon the issue framed under your honor's order, on the ground the defendant has failed to make out the defense set up in the answer, to wit, that the plaintiff purchased this cause of action; that is the defense that is set up, and I desire to call your honor's attention particularly to the form of the defense as pleaded. The defense is that this plaintiff's title is void, because he purchased this cause of action with the intent to sue thereon. It now appears uncontradicted, from the evidence, that, instead of having purchased this cause of action, it was assigned to him under a bona fide assignment for an antecedent indebtedness owing to him for services which he had performed for the corporation.

"The Court: Both sides having moved for a direction of a verdict, I find as a fact that the plaintiff purchased this cause of action with intent to sue thereon.

"I find as a fact, also, that the so-called assignment, Plaintiff's Exhibit No. 1, was executed by the Lake Shore Company, through its officers, pursuant to action at a special meeting of the board of directors."

The court, having thus disposed of the facts, proceeded at some length to express his view of the law, and concluded by directing a verdict for the defendants. Thereupon the counsel for plaintiff said:

"I except to the direction, and I also except to your honor's refusal to allow the case to go to the jury on the questions of fact, if any there be."

The jury then found a verdict in favor of the defendants as directed by the court. The jury was then excused and the counsel for the plaintiff stated that he excepted to the verdict being received, as the direction of a verdict in favor of the defendants was not authorized by the statute or the practice, and that the court's power was limited merely to declaring a nonsuit.

[1] It thus appears that counsel's position at the time was that there were no questions of fact on which to go to the jury, and that the question involved was a pure matter of law for the court to determine. This position, as the above extracts show, he reiterated in the course of the ensuing discussion, saying again:

"My understanding is that the question is one of law, to be passed upon by the court from the facts adduced."

In his application for a reargument he abandons that position, and relies upon the case of Empire State Cattle Co. v. Atchison, Topeka & Santa Fé Ry. Co., 210 U. S. 1, 28 Sup. Ct. 607, 52 L. Ed. 931, 15 Ann. Cas. 70, the syllabus of which he sets up as follows:

"The fact that each party asks for a peremptory instruction to find in his favor does not submit the issues of fact to the court, so as to deprive either party of the right to ask other instructions and to except to the refusal to give them, or to deprive him of the right to have questions of fact submitted to the jury where the evidence on the issues joined is conflicting or divergent inferences may be drawn therefrom. Beuttell v. Magone, 157 U. S. 154 [15 Sup. Ct. 566, 39 L. Ed. 654], distinguished."

The case cited recognizes the right of a party who has asked the court to direct a verdict to subsequently ask the court to have questions of fact submitted to the jury "where the evidence on the issues joined is conflicting or divergent inferences may be drawn therefrom." But to make it error to refuse to allow the matter to go to the jury

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after asking for the direction of a verdict it is evident that there must be questions of fact which can be submitted; and counsel twice declared in most positive terms in open court that there were no such questions of fact, and in his petition he fails to state what the questions of fact are which a jury could pass upon. His exception is to the refusal to allow the case to go to the jury on the questions of fact, "if any there be." If unable himself to state what possible questions of fact there were to be submitted to the jury, he is in no position to ask for a reversal because of the refusal of the judge to submit what did not exist. After informing the court that "there aren't any questions of fact on which to go to the jury," he cannot ask this court to reverse the judge, who was as unable as counsel to see what questions of fact remained for a jury to pass upon.

In Reis v. Rosenfeld, 204 Fed. 282, 122 C. C. A. 480, this court held, Judge Lacombe writing the opinion, that where at the close of the case each side asked for the direction of a verdict, and neither asked to go to the jury on the case generally, or on any question in it, this court would have to accept the findings of the trial court on all such questions.

In United States v. Two Baskets, 205 Fed. 37, 123 C. C. A. 310, both sides moved the court to direct a verdict, and a verdict was directed in favor of the claimant, whereupon the government excepted to such direction, but did not ask to go to the jury upon any question in it, and this court held, Judge Lacombe again writing the opinion (and the suit not being in equity or admiralty), that the appellate court must accept the findings of the trial court.

[2] The above cases are consistent with the doctrine announced by the Supreme Court in the Empire State Cattle Company Case as we understand that case. We are quite agreed that a request preferred by both parties that the court direct a verdict is not in all cases conclusive, so as to deprive a party of his right to have questions of fact submitted to the jury. We only hold that in order that the party may exercise that right there must be questions of fact to submit, and that the parties are concluded as to the particular questions of fact which they have submitted to the court, and upon which the court has made its findings.

[3] This court is not at liberty to review the findings upon the facts, as the case is not in equity, nor in admiralty, but is in this court upon writ of error, which brings up only errors of law.

Application denied.

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(259 Fed. 156)

PENNSYLVANIA R. CO. v. NELSON.

(Circuit Court of Appeals, Second Circuit. February 13, 1919.)

No. 170.

1. MASTER AND SERVANT ⟹105(3)—SAFE PLACE TO WORK—NEGLIGENCE—CUSTOMARY CONSTRUCTION.

There was no negligence of the master in having in use a float on which cars were run, with a stanchion near the side of the cars; the distance being that customary in floats of the kind.

2. MASTER AND SERVANT ⟹217(5)—ASSUMPTION OF RISK.

The risk of nearness to cars of a stanchion on a float is assumed by railroad employé, who for three months, charging him with knowledge of the situation, without objection, continued to load cars on it and other like floats.

3. MASTER AND SERVANT ⟹285(7)—CAUSE OF INJURY—QUESTION FOR JURY.

Circumstantial evidence in action for death of a railroad employé, killed while engaged in loading cars in interstate commerce on a float, *held* insufficient to go to the jury; it making it a matter of speculation whether accident occurred by reason of a coil of rope negligently placed on the incline approach of a platform, or through nearness to cars of stanchion of platform, an assumed risk.

In Error to the District Court of the United States for the Southern District of New York.

Action by Sigrid Gustava Nelson, administratrix of Gustave Adolph Nelson, deceased, against the Pennsylvania Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

The plaintiff in error, defendant below, is hereinafter referred to as defendant. The defendant is a corporation organized and existing under the laws of the state of Pennsylvania, and is an interstate commerce railroad, which, it is alleged, operates in the states of New York, New Jersey, and Pennsylvania, and in connection with its railroad operations it maintains a freight yard in Jersey City and car floats upon which cars are transported to and from the states of New York and New Jersey.

The defendant in error, plaintiff below, is hereinafter referred to as plaintiff. The plaintiff is the widow and administratrix of her husband, who was employed by defendant as a conductor of freight trains, and, at the time of his death, was engaged in interstate commerce.

The plaintiff's intestate received the injuries from which he died on October 31, 1917, while he was engaged in loading cars upon a float in the defendant's yard in Jersey City. It is alleged that the injuries were due to defendant's negligence in failing to furnish the deceased with a reasonably safe place in which to work.

The jury returned a verdict in favor of the plaintiff in the sum of $12,273.

Burlingham, Veeder, Masten & Fearey, of New York City (Morton L. Fearey and S. C. Coleman, both of New York City, of counsel), for plaintiff in error.

Joseph A. Shay, of New York City (Leonard F. Fish, of New York City, of counsel), for defendant in error.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). This suit is brought under Act April 22, 1908, c. 149, 35 Stat. 65, known as

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the federal Employers' Liability Act, U. S. Compiled Statutes Ann. 1916, vol. 8, §§ 8657–8665. This act gives jurisdiction to the courts of the United States concurrent with that of the courts of the several states. The action may be brought in the district in which the cause of action arose, or in the district of the residence of the defendant, or in which the defendant is doing business at the time of the commencement of the action; and this action is brought in the Southern district of New York, in which district the defendant is engaged in business and has its principal office.

The act provides that every common carrier by railroad, while engaged in interstate or foreign commerce, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or in case of the death of such employé to his or her personal representative for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employés of such carrier, or by reason of any defect or insufficiency, due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

At the time of his death the plaintiff's intestate was employed by the defendant, and had been in its employment for somewhere between 13 and 14 years. That he was engaged in the work of interstate commerce at the time of the accident which resulted in his death appears clearly from the evidence, and is not controverted by the defendant. The decedent met his death while at work loading cars upon a float which was moored to a pier on the New Jersey side of the North River, and the cars and the decedent were destined for New York.

The particular float in question was constructed for the purpose of transporting cars, and had a raised platform extending through the center of it from the front to the rear. The tracks, upon which the cars were placed, extended along on either side of the raised platform. The float was long enough to hold 6 connected cars; and hence the float held 12 cars, 6 upon each side of the raised platform. The height of the platform came on a level with the floor of the cars. The platform was covered, and the roof was held up by upright timbers or stanchions. There were no closed sides nor ends to the platform; but it was entirely open, except the roof, which was upheld by the posts or stanchions as stated.

When the cars were being placed upon the float, it was necessary for the deceased to observe that they were not placed with the doors opposite these uprights or stanchions, in order that the doors of the cars should not be obstructed by these uprights, so that the cars might be freely unloaded after reaching the pier in New York. It was also the duty of the deceased to see that the doors of the cars were closed, and to ascertain when there were a sufficient number of cars upon the float, and to signal to the engineer in charge of the locomotive and train, and to see that the tracks were connected to avoid derailment. To accomplish these objects, it was the duty of the deceased to ride upon the step on the front end of the first car, of the string or section of cars, being placed upon the float. At each end of the raised platform was an approach, descending from the ends of the platform, on an incline to a slightly lower level.

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Upon the night of the accident the deceased was riding upon the step on the front end of the first car being placed upon the float, where it was his duty to ride, and where it was the custom for all conductors, as well as himself, to ride, when loading the float. As the cars were being pushed toward the float, and as the first car upon which the deceased was riding entered upon the float, an outcry was heard, and the engineer stopped, and an examination disclosed the deceased lying upon the platform immediately next to the first stanchion, fatally crushed. The platform ran east and west. The cars were being pushed on from the west, and the deceased was found lying upon the platform with his head in a northwesterly position and his feet in a southeasterly position, and about 3 to 5 feet east of the first stanchion. The unmistakable conclusion is that the deceased met his death by being crushed between the first stanchion and the car. There was a clearance of only 11 inches between the stanchion and the car. He had been rolled through the space between the car and the stanchion. He sustained a fracture of the pelvis and other internal injuries from which he died; but his legs were not crushed, and the man's head was not cut in any way and his shoulders were unhurt.

No person was a witness of the accident. But it is claimed by the plaintiff that the position in which the deceased was found shows that on reaching the incline approach to the platform he got off the step of the car and upon the incline, as was the custom, and in doing so stepped upon or into a large coil of rope which had been placed there, and that this caused him to stumble and fall against the stanchion, and that he was rolled around it, and his body was thrown as he was rolled through.

The case was brought on the theory that the defendant had failed to furnish the plaintiff's intestate with a safe place in which to work. That the place was unsafe: (1) Inasmuch as the space between the stanchion on the float and the side of the car as it entered the float and passed the stanchion was too narrow. (2) Because a coil of rope was negligently placed upon the incline approach of the platform.

[1, 2] The trial court withdrew from the jury's consideration the first of the above claims. The undisputed evidence was that the float was built as floats are customarily, and the distance between the stanchion and the side of the car was the customary distance in floats of this kind. It was not negligence, therefore, for the defendant to have in use such a float; and, if it had been negligence, the plaintiff was chargeable with knowledge of the distance between the stanchion and the side of the car, as he had been working for three months prior to the accident on this and other like floats, and as he worked on with knowledge and without objection he must be held to have assumed the risk. There was no error in withdrawing that matter from the jury.

But the presence of the coil of rope on the incline of the platform was quite another matter, and must now be considered. The plaintiff contends:

"That the defendant was guilty of negligence in placing the rope upon the incline where conductors were compelled to step from moving cars in the night, and that the facts warranted the inference that the deceased in stepping from the car upon the platform stumbled upon the coil of rope and was pre-

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cipitated forward between the stanchion and the car, thus rendering the defendant liable."

It appears that at the time of this accident rope was lying on the incline of the platform. A member of the decedent's crew, who had worked for three or four years in loading cars on the float, was asked whether he had in the course of that time ever seen a coil of rope lying as that did upon the incline, and he said that he had never seen one coiled up like that. He had sometimes seen a rope lying on the incline, but he had never seen it lying there coiled. And the examination of another witness, a member of decedent's crew, was as follows:

"Q. Did you, in the time you worked there, ever see a coil of rope upon an incline? A. I never saw it coiled up like that.

"Q. What did you see? A. I most generally saw it laying lengthwise on the side of the track, or in the center of the track, or lengthwise on the platform.

"Q. But on a level with the platform? A. Yes.

"Q. And never on the incline? A. No, sir."

And on cross-examination:

"Q. You have seen them [ropes] lengthwise on the platform? A. Yes.

"Q. But you never saw one on the slope of the platform? A. No, sir."

And on this particular occasion the rope lay near the side of the platform and about 4 or 5 feet from the first stanchion. It was a 5-inch rope, was 50 feet in length, brand new, and "was all tied up," and "looked as if it never had been used." It was coiled up "pretty big." A witness, who was asked whether, after the accident, his impression was that the rope was "neatly coiled," answered, "Yes."

"Q. It was not scattered around? A. No; it was not scattered around."

From the fact that it was not scattered, the defendant claimed the deceased could not have tripped over it. But, as the coil was tied up, the strength with which it was tied might account for its not "being scattered around," if the plaintiff had tripped over it or stepped into it. The defendant produced two or three witnesses who testified that the incline was a proper place on which to keep the rope, and that it was usually kept there.

The assistant boatman of the defendant's New York division, called by the defendant, was asked on cross-examination whether he meant to say that the incline was a safe place for the coil of rope to lie. His reply was:

"It is obvious it is not the absolutely safest place, but it is the common place. There are a great many unsafe things done in life."

And he said:

"Wherever it might be placed, it presents an obstruction, obviously."

The defendant also placed on the stand the foreman of the bridges. He was asked on cross-examination whether he thought that the rope lying on the incline was the cause of the plaintiff's death. No objection was made to the question, and he replied, "I cannot answer that." He was then asked whether he thought the plaintiff walked over the rope. And he replied, "I cannot answer it." But counsel for

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defendant objected to the last question, and the court sustained the objection. It developed that after the accident the witness had removed the rope from the incline. He was asked why he had removed it. And he replied:

"And I took the rope off, so nobody else would stumble over it and get hurt, on account of being up on the end sill, on account of the doctor and the rest of them.

"Q. That is the reason you took it off of the incline? A. Yes, sir."

[3] The plaintiff contends that the deceased could not have been caught between the stanchion and the car while standing on the car step, as he well knew it was sure death to have remained there, and that it was the custom for him and other conductors to step upon the incline when they reached it, and that if he had remained on the step his legs would have been crushed, and they remained uninjured; that the practice was to jump off from the step of the car to the incline of the platform.

The defendant contends that there is no evidence tending to show that the presence of the rope caused the accident, but that the jury was permitted from the mere presence of the rope to speculate as to the cause of the death.

Now the law undoubtedly is that a plaintiff must make out his case by a preponderance of the evidence. A jury cannot base their verdict upon mere conjecture and a bare possibility. If it appears that the damages claimed were occasioned by one of two causes, for one of which the defendant is responsible, and for the other of which it is not responsible, the plaintiff must fail if the evidence does not disclose that the damage was produced by the former cause; and she must fail, also, if it is just as probable that they were caused by the one as by the other. Searles v. Manhattan Ry. Co., 101 N. Y. 661, 5 N. E. 66. And in Ruback v. McCleary, 220 N. Y. 188, 115 N. E. 449, the court, referring to the rule, declared that—

"If the matter [the cause of the injury] is left in doubt, and it is as probable that the injury was the result of one cause as the other, there can be no recovery."

The disposition to be made of this case in this court must depend upon whether there was any evidence in the case which warranted the jury in finding that the deceased met his death in the manner which the plaintiff claims; for it is settled law that it is error to submit a question to a jury where there is no evidence upon the subject. In Improvement Co. v. Munson, 14 Wall. 442, 448, 20 L. Ed. 867, the court declared that it was held at one time that if there was a scintilla of evidence in support of a case the judge was bound to leave it to the jury, but recent decisions of high authority had established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.

In Pollock v. Pollock, 71 N. Y. 137, 153, the New York Court of Appeals, speaking through Judge Folger, said, "Insufficient evidence

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is, in the eye of the law, no evidence," and cited the language of Maule, J., in Jewell v. Parr, 13 C. B. 916, where he said:

"When we say that there is no evidence to go to a jury, we do not mean literally none, but that there is none that ought reasonably to satisfy a jury that the fact sought to be proved is established."

In Bond v. Smith, 113 N. Y. 378, 385, 21 N. E. 128, 130, Earl, J., said:

"We have no right to guess. * * * She [the plaintiff] simply furnished them [the jury] food for speculation, and that will not do for the basis of a verdict. The law demands proof, and not mere surmises. The authorities are ample to show in such a case the plaintiff should have been nonsuited."

In Pauley v. S. G. & L. Co., 131 N. Y. 90, 99, 29 N. E. 999, 1001, 15 L. R. A. 194, Judge Finch, speaking for the court, said that—

"We are not to resort to conjecture, and permit a verdict to be based on bare possibilities alone. * * * A mere conjecture, built upon a bare possibility, will not suffice to transfer the money or property of one man to the possession and profit of another."

In Laidlaw v. Sage, 158 N. Y. 73, 52 N. E. 679, 44 L. R. A. 216, the New York Court of Appeals reviewed a long line of decisions in that state showing that that court has uniformly held that, to justify the submission to the jury of any issue, there must be sufficient proof to sustain the claim of the party upon whom the onus rests, and "that mere conjecture, surmise, speculation, bare possibility, or a mere scintilla of evidence, is not enough." And see Baulec v. N. Y., N. H. & H. R. Co., 59 N. Y. 356, 366, 17 Am. Rep. 325; Cordell v. N. Y. C. & H. R. R. Co., 75 N. Y. 330; Dubois v. City of Kingston, 102 N. Y. 219, 6 N. E. 273, 55 Am. Rep. 804; Linkauf v. Lombard, 137 N. Y. 417, 425, 33 N. E. 472, 20 L. R. A. 48, 33 Am. St. Rep. 743; Hemmens v. Nelson, 138 N. Y. 517, 34 N. E. 342, 20 L. R. A. 440; Hudson v. R., W. & O. R. Co., 145 N. Y. 408, 412, 40 N. E. 8; Moscato v. Prince Line, Limited, 164 App. Div. 412, 417, 150 N. Y. Supp. 225.

At the close of the plaintiff's case counsel for defendant moved to dismiss the complaint. But the court, after expressing the opinion already referred to, that the deceased had assumed the risk of the narrow space between the stanchion and the side of the car, did not think it could be held that the deceased had assumed the risk of the coil or rope on the incline of the platform, and that that question was for the jury, as was the question whether the intestate's death was caused by the presence of the coil on the incline. Counsel for defendant argued that the deceased had assumed the risk of any injuries resulting from the condition of the stanchion or the condition of the rope, and claimed that there was no evidence that the rope had anything to do with the accident. Thereupon the court said:

"It seems to me that is a question of fact. I think the evidence of its location with reference to the stanchion is such that I have to let the jury pass on it."

And counsel replied:

"I want to call attention to one significant fact: If this man stumbled over a rope from a car which was moving forward, his motion was forward, and

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it seems to me absolutely impossible that he could have been injured around the hips, and not have been injured on his shoulders or his head."

The court remarked, "That is an argument." Whereupon counsel continued to argue the matter at length, and when he had concluded the court denied his motion.

If there was some evidence that the rope was the cause of the accident, and the place where the body was found and the nature of the injuries upon it indicated that death resulted from that cause, it would not be unreasonable to infer that the deceased had according to the usual practice stepped from the car to the incline and stumbled on the coil of rope. As no one saw the accident, the cause is a matter of inference. Did the deceased meet his death by remaining, contrary to custom, on the step of the car, when he must have known that remaining there meant probable death; or did he in the customary manner attempt to alight upon the incline, and in so doing stumble over the rope and into the space between the stanchion and the car? The jury has found that he did the latter. That verdict must stand, if there is evidence from which the jury could legitimately arrive at the conclusion they reached. As no one witnessed the accident, the evidence is indirect and circumstantial, and a jury may, if the circumstances are sufficient, infer the cause of death. Harrison v. N. Y. C. & H. R. R. Co., 195 N. Y. 86, 89, 87 N. E. 802. But the circumstances must be sufficient. In Lopez v. Campbell, 163 N. Y. 340, 347, 57 N. E. 501, 503, the court said that—

"While a material fact may be established by circumstantial evidence, still, to do so the circumstances must be such as to fairly and reasonably lead to the conclusion sought to be established, and to fairly and reasonably exclude any other hypothesis. Where the evidence is capable of an interpretation which makes it equally consistent with the absence as with the presence of a wrongful act, that meaning must be ascribed to it which accords with its absence. In other words, it can only be established by proof of such circumstances as are irreconcilable with any other theory than that the act was done. As has been said: 'Insufficient evidence is, in the eye of the law, no evidence.'" Wheelan v. Chicago, etc., R. Co., 85 Iowa, 167, 175, 52 N. W. 119; Asbach v. Chicago, Burlington & Quincy Railway Co., 74 Iowa, 250, 37 N. W. 182.

Verdicts must not rest upon supposition, but upon evidence. Applying the doctrine stated to the instant case requires that circumstances proven must be irreconcilable with the theory that the intestate remained on the step of the car and was crushed between the stanchion and the car, which was a risk which he had assumed. To charge the jury that they must be reasonably satisfied that the coil of rope was the cause of the intestate's death cannot save the verdict, if there is no evidence which shows that the death happened because of the coil of rope, and not because the plaintiff failed to alight upon the incline.

The difficulty in this case arises from the possibility that death may have happened in either of two ways, and that, if it happened in one of these ways, there can be no recovery, as the risk had been assumed; so that the evidence that the death occurred in one way and not in the other must not rest upon conjecture, surmise, speculation, and bare possibility, but it must be convincing in its nature. The position in

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which the body was found on the platform, the crushed hips and pelvis, the uninjured head, shoulders, and legs, and the undisturbed coil of rope are the circumstances which the evidence discloses. From those circumstances alone we do not think it possible for any jury to decide, except as a matter of mere conjecture and speculation, whether the plaintiff's intestate attempted to get upon the platform at the incline, and tripped over the rope, and fell between the stanchion and the car, and was thus crushed and rolled upon the platform, or whether he rode past the incline, and his hips were caught and crushed between the stanchion and the car while he was standing upright on the step of the car, and the motion of the car rolled his body, so that it was found lying east of the stanchion.

To say that the facts reveal as clearly how the accident occurred as if an eyewitness had described it, as counsel argued in this court, seems to us wholly unwarranted, and very far from the fact. The only thing certain is that the deceased met his death in one way or the other, but in which way is purely a matter of speculation or surmise; and as he had assumed the risk of death in one of these two ways the plaintiff is not entitled to recover because she has not proved that the deceased met his death by the risk which he had not assumed. To hold otherwise is to allow a jury to speculate upon the cause of death, and to allow that is to trifle with the rights of parties. Patton v. Texas & Pacific Railway Co., 179 U. S. 658, 665, 21 Sup. Ct. 275, 45 L. Ed. 361.

It has been said that a judgment of a trial court is not to be reversed on a mere conjecture. Britt v. Omaha Concrete Stone Co., 99 Neb. 300, 303, 156 N. W. 497. That is certainly true, and it is also true that a judgment of a trial court cannot stand if it rests on a mere surmise.

Judgment reversed.

(259 Fed. 163)

PHILADELPHIA, B. & W. R. CO. v. STATE OF MARYLAND, to Use of PANTLEY et al.

(Circuit Court of Appeals, Fourth Circuit. January 7, 1919.)

No. 1642.

RAILROADS ⟹307(6)—ACCIDENT AT CROSSING—NEGLIGENCE OF WATCHMAN.

On the question of negligence of a watchman at a railroad crossing over four tracks in inviting three automobiles, following each other, to cross, one of which was struck by a train, the court *held* to have properly instructed that it was his duty to allow all time to cross at ordinary speed "with a fairly clear margin of safety."

In Error to the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge.

Action by the State of Maryland, to the use of John C. Pantley and Amelia H. Pantley, against the Philadelphia, Baltimore & Washington Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

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Shirley Carter, of Baltimore, Md. (Bernard Carter & Sons, of Baltimore, Md., on the brief), for plaintiff in error.

Raymond S. Williams and Arthur W. Machen, Jr., both of Baltimore, Md., for defendant in error.

Before KNAPP and WOODS, Circuit Judges, and McDOWELL, District Judge.

KNAPP, Circuit Judge. This suit grows out of a grade crossing accident in which William C. Pantley lost his life. The undisputed facts appear to be these: At Severn, Md., the tracks of plaintiff in error, hereinafter called defendant, run north and south, and are crossed by a highway running east and west. This highway connects Camp Meade with the city of Baltimore, and is much traveled by automobiles and other vehicles. There are four tracks at the crossing, of which the most easterly is for north-bound, and the next easterly for south-bound, passenger trains. The distance from the most eastern to the most western rail is 37 feet; the driveway over the tracks is 14 feet in width. The entire crossing is practically level and slightly above the adjacent highway, which is graded up to it on either side.

The accident occurred on the 13th day of October, 1917, about half after 7 in the evening. Three automobiles going east came to the westerly side of the crossing. The second had become disabled, and the first was towing it by a steel cable some 7 feet in length; the third, in which Pantley was riding, closely followed the second. The colored watchman on duty signaled them to proceed, and they started over the tracks. A moment later, and while they were on the crossing, a north-bound passenger train running at high speed was seen to be almost upon them. Some one called out to them to "jump," or gave a similar warning, and the occupants of the machines leaped to the ground, Pantley among the rest. In his fright and bewilderment he ran forward directly in front of the train and was instantly killed. The first automobile was all the way over and escaped; the second was right on the track, and hit by the locomotive; the third, a little further to the west, was not touched. If Pantley had remained in his seat, or run backward, he would have been in a place of safety.

Within this outline of substantial agreement there is sharp dispute as to what actually happened. The plaintiffs claim in substance that the automobile came to a stop on reaching the crossing; that the watchman, not only waved his lantern for them to go ahead, but called to them to do so; that this was assurance of ample time to cross the tracks without any danger; that the machines accordingly started on in the order named, the first in low gear and going at slow speed over the rails; that presently, and when this car was a little more than half way across, the watchman cried out to "hurry up"; that a moment after the train in question, which had come round a curve less than 600 feet distant, was shown by the headlight to be rapidly approaching; that it was then too late to avoid the collision; and that, in short, the defendant is liable because the watchman invited the automobiles to cross when he knew, or ought to have known, that a fast train, already overdue, was about to pass at great speed. Against this

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the defendant says that the three machines had abundant time to get across the tracks without the slightest risk; that the interval between the watchman's signal to go on and the arrival of the train at the crossing was sufficient for an automobile to pass over it some seven times, even at the slow rate of 4 miles an hour, and that the testimony so demonstrates; that the accident happened solely because the first car for some reason stopped on the track, holding up those behind it, for at least 30 seconds, or several times as long as it would take an automobile to go from one side of the crossing to the other; that the watchman had the right to assume that the machines would get over all the tracks in the usual time; that he could not anticipate, and was not bound to anticipate, the stoppage which actually occurred, or any stoppage at all; and that, in a word, there was no negligence or faulty judgment or failure of duty on his part.

It needs no argument to show that the opposing proofs thus summarized made a case for the jury; and the defendant apparently so concedes, as no motion was made for a directed verdict and no assignment of error challenges the submission. In the court below there was a plea to the jurisdiction, to which the plaintiffs demurred; the demurrer was sustained, and error is assigned; but the contention has not been made in this court, either in brief or oral argument, and may properly be deemed abandoned.

Exception was noted to the judge's charge as a whole, which defendant says was unfair, partisan, and calculated to create prejudice in the minds of the jurors; and there is a corresponding assignment of error. It would be sufficient to observe, as has often been held, that such an assignment brings up nothing for review and should be disregarded; but we take occasion to add that careful examination of the charge delivered, and of the comments of the court in passing upon some 27 exceptions filed by defendant's counsel, discloses no basis for the objection here considered. The accusation of partiality is wholly unwarranted.

The remaining assignments of error, raising the only reviewable questions of record, relate to certain requested instructions, five in number, which the trial court rejected. As they all present the same proposition in different forms, the quotation of one will suffice:

"The court instructs the jury that they must find their verdict for the defendant in this case, if they find from the evidence that young Pantley's death was the consequence of the second automobile, mentioned in the evidence, stopping on the north-bound or fourth track mentioned in the evidence, provided they find from the evidence that, after the watchman signaled the automobile to come over the crossing, all three automobiles, going at ordinary speed, had time to get entirely over the crossing before the arrival of the train."

What the judge charged in the first instance was this:

"If the watchman invited these trucks to go upon the tracks when there was not sufficient time for vehicles of the kind, moving over eight lines of rails, to make a trip with absolute and entire safety, then the defendant would be liable; for in that case, if there was danger, the watchman invited the autos into the danger. On the other hand, if, at the time the watchman gave them the signal and a verbal invitation to cross, there was ample time for the cars to have crossed the tracks and be clear of any pos-

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sible danger before the train arrived, and the accident happened solely because the automobiles stopped on the tracks by reason of some lack of power or some other condition, and that stoppage lasted long enough, not only to consume all the margin of safety which a reasonably prudent watchman would have allowed the trucks to leave the tracks when the train arrived, but to detain them on the tracks until the train came, then the watchman was not at fault, and the accident was not the result of his negligence."

And later, in passing upon the exceptions to the original charge, the following was said:

"The other exception raises substantially the point of your prayers, as I understand it. It raises the question of whether, if the watchman gave them the signal to cross at a time when, if the cars had moved with ordinary speed, every one of them would have cleared the tracks, the defendant cannot be liable. On that question, gentlemen, it is for you to say whether or not he did. As I have stated, in view of all the circumstances, did he act as a prudent man would have done in calling those cars to go on the track at the time he did call them? If the train was then so far off, if what he did was the act of a reasonable and prudent man, in that the cars moving over could have had a chance to get over the tracks had they moved properly, could have cleared the tracks with a fairly clear margin of safety, so he was not taking any unreasonable chances, the railroad is not liable. On the other hand, if he cut the margin too close in your judgment, looking at all the facts and circumstances, so that you think what he did was not the act of a reasonable and prudent man, the railroad is liable."

We need not dwell upon the difference between these instructions, which speak for themselves, and those that were rejected. In our opinion, the former state correctly the applicable rule of law, while the latter define too narrowly the duty and liability of the defendant. To say nothing else, they apparently exclude the "margin of safety" to which in such cases the highway traveler is entitled; for, as the court below remarked, "the watchman was stationed at the crossing, not for the purpose of letting cars take chances, but to prevent them from doing so."

We find no reversible error, and the judgment will therefore be affirmed.

(259 Fed. 166)

WILMINGTON RY. BRIDGE CO. et al. v. FRANCO-OTTOMAN SHIPPING CO., Limited, et al.

THE CROMWELL.

(Circuit Court of Appeals, Fourth Circuit. January 7, 1919.)

No. 1637.

1. NAVIGABLE WATERS ⚷20(2)—BRIDGES—APPROVAL BY GOVERNMENT—OBSTRUCTION TO NAVIGATION.

   The official approval by the government of the construction of a bridge is conclusive that the bridge was a lawful structure, though it interfered with navigation.

2. SHIPPING ⚷81(2)—INJURIES TO BRIDGE—DUTY OF VESSEL.

   Where a bridge over a navigable river was a lawful structure, though it obstructed navigation, a vessel must approach it with reasonable skill and care to avoid injuring it, having in view the difficulty and peril occasioned by the bridge itself, but need not guarantee its safety.

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3. SHIPPING ⟹86(2)—INJURIES TO BRIDGE—PRESUMPTION OF NEGLIGENCE.
Where a moving vessel collided with a drawbridge, there is a presumption of negligence on the part of the vessel; but that presumption may be rebutted by proof that the course taken by the navigator in the emergency caused by the location of the bridge was prudent and skillful.

4. SHIPPING ⟹86(2)—INJURY TO BRIDGE—NEGLIGENCE OF VESSEL.
Where a collision occurred between a vessel in tow of a tug and a drawbridge, which, though lawful, was constructed diagonally across the channel, so as to allow very little room for passing vessels, evidence *held* not to show that the vessel approached the bridge on a flood tide, or that it was negligent navigation of the vessel to attempt to turn to port, instead of immediately anchoring, after she began to sheer to starboard when passing close to shoals near the bridge, as she was compelled to do to pass through the draw.

5. SHIPPING ⟹81(2)—INJURY TO BRIDGE—CARE REQUIRED.
In an emergency created by a sudden sheer of a vessel when approaching a drawbridge, navigator was responsible for reasonable care, not the highest degree of skill and care.

6. SHIPPING ⟹81(1)—LIABILITY OF VESSEL—NEGLIGENCE OF PILOT.
A vessel is liable for the negligence of a mere pilot, even when employed under the compulsion of law.

7. TOWAGE ⟹19—LIABILITY OF VESSEL—NEGLIGENCE OF CONTRACTOR.
Where a vessel had contracted with a towing company to be towed to dock, and at the time of a collision with a drawbridge was navigated by the master of the tugboat, whose orders were transferred to the crew by the vessel's master, negligence in navigation of the vessel was negligence of an independent contractor, for which the vessel is not liable.

Appeal from the District Court of the United States for the Eastern District of North Carolina, at Wilmington; Henry G. Connor, Judge.

Petition by the Franco-Ottoman Shipping Company, Limited, as owner of the steamship Cromwell, and others, against the Wilmington Railway Bridge Company and others, to limit liability for injuries to the bridge, caused by collision of the vessel with the bridge. Decree for petitioners (247 Fed. 207), and defendants appeal. Affirmed.

Thomas W. Davis and John D. Bellamy, both of Wilmington, N. C., for appellants.

J. O. Carr, of Wilmington, N. C., and J. Parker Kirlin, of New York City (John M. Woolsey, of New York City, and George Rountree, of Wilmington, N. C., on the brief), for appellees.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. In the port of Wilmington, N. C., the Cromwell, a British vessel, on her passage up the Cape Fear river to the dock where she was to unload her cargo of pyrites, struck and injured the railroad bridge. Separate actions for damages were brought in the state court by the appellants, owners of the bridge, and attachments were issued. Thereafter the issue of negligence and the liability of the ship was transferred to the District Court of the United States under a petition for the limitation of liability. Richardson v. Harmon, 222 U. S. 96, 32 Sup. Ct. 27, 56 L. Ed. 110. The negligence charged was (a) attempting to put the ship through the draw on an upflowing tidal current in the narrow channel, which made the control of a vessel as large

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as the Cromwell exceedingly difficult; (b) permitting the ship to sheer about 700 feet below the bridge, and failing to take measures to correct the sheer until the ship was within 60 or 70 feet of the bridge; (c) turning and holding the wheel hard to starboard, starting the engine astern, and throwing out the starboard anchor 60 or 70 feet from the bridge, when the ship was still sheering to starboard, and heading for a span of the bridge, thus it is alleged, turning the bow further to starboard and causing it to strike the bridge; (d) having an incompetent pilot and incompetent officers on deck and at the wheel.

The owners of the Cromwell denied negligence; alleged, if there was negligence in the navigation of the ship, it was that of the Diamond Steamboat & Wrecking Company, owner of the tug Gladiator, employed as an independent contractor to take the ship up the river to its dock; and charged that the collision was due to negligence in constructing the bridge obliquely across the channel and with such a narrow draw that it was an unlawful obstruction to navigation.

The District Court held that no negligence in the navigation of the ship had been proved, and that, even if there was negligence, it was that of the Towing Company, of which the Wilmington Towing Company is successor, as an independent contractor.

[1] Official records and the testimony of the engineer leave no room to doubt that the bridge was constructed and maintained according to the government's requirements. This official approval is conclusive that the bridge was a lawful structure, though it interfered with navigation. Miller v. Mayor of N. Y., 109 U. S. 385, 3 Sup. Ct. 228, 27 L. Ed. 971. If, therefore, the ship had been injured by the bridge, it would have had no right of action.

[2] It follows that a vessel, in passing through the draw of such a bridge, is burdened with the obligation to recognize it as a legal structure, to take notice of the extent to which it obstructs navigation, and use reasonable skill and care to avoid injuring it, having in view the difficulty and peril, although the difficulty and peril be created by the bridge itself. Due care in such case is the care which the unusual and difficult conditions suggest as reasonable. But the bridge owners cannot lay upon the ship a duty to guarantee safety against every possible peril and difficulty which their own obstruction to navigation had brought about.

[3] On the issue of negligence the bridge owners have in their favor the presumption that a moving vessel is negligent in colliding with a vessel at anchor or a dock or bridge properly constructed. The Virginia Ehrman and the Agnese, 97 U. S. 309–317, 24 L. Ed. 890; Inland & Seaboard C. Co. v. Tolson, 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270; The W. G. Mason, 142 Fed. 913–915, 74 C. C. A. 83; Minnesota S. S. Co. v. Lehigh Valley Transportation Co., 129 Fed. 22–33, 63 C. C. A. 672. But this presumption of negligence by the moving ship may be rebutted by proof that the location of the stationary vessel, the obstruction of navigation by the bridge, or other causes had brought the moving vessel into an emergency not to be reasonably foreseen, and that the course taken by the navigator in the emergency was such as might well have been taken by a prudent and skillful navigator.

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[4] These facts are not in dispute: The Cromwell was 312 feet long, 43 feet wide, 21.10 feet deep, 3,086 tons gross, 1,877 tons net, register, drawing at the time of the collision 16 feet of water. The agent of the Cromwell employed the tug Gladiator, owned by the Diamond Steamboat & Wrecking Company to tow the ship up the river through the draw of the railroad bridge to the Swift Fertilizer Works. Although the draw of the bridge had been approved by the government engineers as a lawful structure, the bridge crossed the river diagonally, and only 61 feet of open way was left for the passage of vessels. This construction and the limited space, together with the presence of shoals in the river, made the towing of vessels through the draw a task so difficult and perilous that it was the subject of much anxiety and complaint by all pilots and persons concerned in the commerce of the port. The main peril to be guarded against was the sheering of the ship on its near approach to the lower shoal necessary to the passage. The Diamond Company was a local company of good reputation, and Sanders, who directed the movements of the tug Gladiator was an experienced officer and pilot, who had taken a number of other vessels through the draw. The master of the Cromwell had no knowledge of the river, and relied entirely on Sanders to navigate tug and tow. The pilots of the port used two methods in towing large vessels through the draw: Some pulled the tow through by a hawser attached to the tug; others used what they thought the safer method of lashing the tug to the vessel and at a certain point releasing the vessel while in motion, thus "kicking" it through. But there was no consensus of opinion that the former method was less safe than the latter, nor do the facts justify such a conclusion.

A number of large vessels had been safely taken through the draw without striking the bridge; but on several occasions vessels in charge of experienced pilots had sheered and struck the bridge without material injury.

The care necessary in taking the Cromwell through was fully appreciated, and precautions had been taken for prompt action in controlling her movement. Sanders, who directed the actions to be taken on both vessels, was on the bridge of the Cromwell. Wicklen, master of the Cromwell, was by his side, conveying his orders to the engineer and helmsman of the Cromwell, both of whom were at their posts. Sellars, an experienced tug master, was on the tug, obeying the orders of Sanders. Knowing that due care required the movement to be made at high-water slack, Sanders and Sellars had the night before ascertained the time of high tide from the almanac used as authority, and timed the movement so as to reach the draw about an hour later, when the tide would be high-water slack—that is, at the flood, either stationary or flowing slightly seaward against the vessel. Tug and tow approached the draw, going at the cautious speed of a half mile to a mile an hour.

Thus the undisputed facts show due care at least to a point 700 feet from the draw. The charge of negligence then turns on the question whether at that critical point vigilance and apparent efficiency were relaxed into negligence and incompetency. In answering this inquiry, it must be borne in mind that, although the bridge was a lawful ob-

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struction to navigation, the owners of the bridge, in making the charge of negligence, are burdened with the fact that they had chosen in its construction to leave little, if any, of that margin of safety which experience shows to be requisite to the avoidance of disaster, even when due care is exercised.

The first charge of negligence in attempting to go through the draw while the tide was running up, we think, was not established. The almanac generally relied on by navigators indicated that the tide would be high slack. The evidence is conflicting as to whether on the surface the tide was still running upward. Sellars, the tug master, testified that he saw by observation that the tide was dropping. But, even if it was still upward on the surface, the evidence and common experience show that this condition continues after the undertow has set outward against the incoming vessel.

The claimants alleged, and introduced testimony tending to prove, that the sheer occurred about 700 feet from the bridge, and that there was time and space enough to enable the navigators to correct it by the exercise of due care and skill. The testimony on behalf of the vessel was that the sheer occurred about 500 feet from the draw, and that in this emergency the navigators did all that they could to right the ship and prevent the collision. On this issue it appears clearly from the evidence that, in approaching the draw, a large vessel must necessarily go very near to the shoals on the west side of the river, and that sometimes, even with careful and skillful navigation, it will get into water shallow enough to make the ship sheer to starboard. This was what happened to the Cromwell, and we are unable to find any evidence that it was due to negligent navigation rather than the intrinsic peril of navigating in such conditions. With the occurrence of the sheer arises the difficulty of correcting it in time to avoid striking the bridge.

In this instance, when the sheer occurred, the tug was pulling with the hawser taut. The Cromwell had steam up, with her propeller either still or in very slow forward movement. To correct the sheer of the ship to starboard, Sanders ordered the tug to port and the wheel of the Cromwell hard to starboard. These orders would ordinarily result in porting the ship, thus correcting the sheer to starboard; but, on account of the slow movement of the vessel, these measures did not sufficiently correct the sheer. When this failure became evident, Sanders ordered the Cromwell full speed astern, the anchors dropped, and the tug to cease pulling. These orders were carried out promptly, except that only one of the four anchors was dropped. The headway of the ship was not sufficiently arrested to avoid striking the bridge.

[5] There was a difference of opinion among navigators as to the proper course to pursue when the sheer occurred. It might have been most prudent to attempt to stop the ship by reversing the engine and dropping all anchors as soon as the sheer occurred; but it was not shown to be unreasonable to expect to correct the sheer to starboard by using both the tug and the wheel to port the ship. There was some testimony to the effect that Sanders should have ordered the ship full speed ahead. But, on the other hand, there was abundant evidence that he gave the only proper orders; and in the emergency he was responsi-

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ble for reasonable, not the highest degree of, skill and care. The Ludvig Holberg, 157 U. S. 68–72, 15 Sup. Ct. 477, 39 L. Ed. 620.

While the question of negligence is not free from difficulty, we think the finding of the District Court that the tug and vessel were managed by a capable and experienced navigator with reasonable care and skill under the circumstances is well sustained by the evidence.

[6] Even if there was negligence, however, there can be no doubt that it was that of Sanders, the navigator of both vessels. Had the ship employed Sanders as a mere pilot, even under the compulsion of law, it would be liable for his negligence. The China, 7 Wall. 53, 19 L. Ed. 67; De Lima v. Bidwell, 182 U. S. 1, 21 Sup. Ct. 743, 45 L. Ed. 1041.

[7] But the evidence of Henry Whyte shows clearly that Sanders was not a mere pilot of the Cromwell, but was the commander of the tug Gladiator, under the authority of its owners, who had contracted that the tug should tow the Cromwell up the river to the draw where it was to unload. Whyte was the local agent of the Seaboard Air Line Railway Company, one of the appellants, and also the agent and consignee of the Cromwell. He testified that he—

"paid the tugboat $40 to take it to the Seaboard terminals, and $100 for taking it up to Swift's factory and return from the factory to the terminals; total, $140."

The money was paid to McGirt, the agent of Diamond Steamboat & Wrecking Company, who testified that he received it from Whyte as agent for the steamship for towing her to the Seaboard terminal and thence up the river and through the bridge to the Swift Fertilizer Factory and back, and that he turned over to Sanders his portion of it as the representative of the Gladiator. The owners of the tug having thus entered into an independent contract of towing, the tug alone would be responsible for negligence in the undertaking, unless officers of the Cromwell retained some control of the ship and were guilty of some negligence. It is true her master and crew were on the Cromwell, carrying out the orders of Sanders, but they did nothing more, and in that relation they were mere instrumentalities or means used by Sanders to apply the wheel, engine, and other instruments of navigation—not participants in the navigation. Hence it seems evident that, if the injury to bridge was due to negligence, it was that of the towing company, owner of the tug, as an independent contractor, for which the Cromwell was not responsible. Sturgis v. Boyer et al., 24 How. 110, 16 L. Ed. 591; The Eugene F. Moran, 212 U. S. 466, 29 Sup. Ct. 339, 53 L. Ed. 600.

Affirmed.

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(259 Fed. 172)

ERIE R. CO. v. COLLINS.*

(Circuit Court of Appeals, Second Circuit. January 30, 1919.)

No. 40.

1. COMMERCE ⟹27(5)—EMPLOYERS' LIABILITY ACT—EMPLOYÉ ENGAGED IN "INTERSTATE COMMERCE."

A railroad employé in charge of a signal tower and water tanks, who was injured while operating a pump for pumping water from a well into the tanks for supplying water to the locomotives of both interstate and intrastate trains, *held* engaged in work so closely related to interstate commerce as to be within Employers' Liability Act, § 1 (Comp. St. § 8657).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

2. MASTER AND SERVANT ⟹217(1)—ASSUMED RISKS—KNOWLEDGE OF DANGER.

A servant does not assume risks due to the negligence of his employer and fellow employés, unless they are obvious or fully known and appreciated by him.

3. MASTER AND SERVANT ⟹153(2)—MASTER'S LIABILITY FOR INJURY TO SERVANT—WARNING INEXPERIENCED SERVANT.

A railroad company, which placed a young man in charge of the operation of a gasoline pumping engine, of which he had no knowledge or experience, without instruction or warning as to the danger, *held* chargeable with negligence, which rendered it liable for his injury by an explosion of vapor from the engine.

4. DAMAGES ⟹216(10)—PERSONAL INJURY—MENTAL SUFFERING.

Shame and humiliation, which an injured employé may suffer as a result of a facial disfigurement, may properly be considered, under a charge permitting damages for mental suffering.

Hough, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Western District of New York.

Action at law by William M. Collins against the Erie Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

For opinion below, see 245 Fed. 811.

The action is brought under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. §§ 8657–8665]) to recover damages for personal injuries which defendant in error, hereinafter called plaintiff, is alleged to have suffered because of the negligence of the plaintiff in error, hereinafter called defendant. The plaintiff recovered a verdict for $15,000, and judgment has been entered in his favor for $15,045.66.

Moot, Sprague, Brownell & Marcy, of Buffalo, N. Y. (John W. Ryan, of Buffalo, N. Y., of counsel), for plaintiff in error.

Hamilton Ward, of Buffalo, N. Y. (Irving W. Cole, of Buffalo, N. Y., of counsel), for defendant in error.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

ROGERS, Circuit Judge. [1] The plaintiff, when 17 years old, entered defendant's service in January, 1912, and for a time served

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Certiorari granted 250 U. S. —, 39 Sup. Ct. 490, 63 L. Ed. —.

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as a ticket seller and night telegraph operator at a small village in the state of New York. On December 21, 1915, he was put in charge of a signaling tower and water tank. The tower was used for the operation of the interstate and intrastate trains of the defendant. The tank was used for the purpose of supplying water to the engines of such trains. It was the plaintiff's duty to report the trains as they went back and forth by the tower to the dispatcher in Buffalo. In case a train wanted to go on the siding, the dispatcher notified plaintiff to put the train on the siding, and it was necessary for him to walk down the track 4 or 5 rods and throw the switch, and walk up the track about the same distance and throw another switch. The tower was equipped with telegraph and telephone instruments. About 25 freight trains a day took water at the water tank, and 7 or 8 engines exhausted the water which the tank held at any one time. The water in the tank came from a closeby well, being forced from it into the tank by a pump operated by a gasoline engine which the plaintiff ran.

The defendant claims that this action cannot be maintained, because the plaintiff at the time of his injury was not employed in interstate commerce within the meaning of the federal Employers' Liability Act. This question must be first determined, for, if not within the act, the court below was without jurisdiction, and judgment must be reversed. The question was raised by a motion for a nonsuit at the close of plaintiff's case, which motion, having been denied, was renewed at the close of all the evidence, and again by defendant's request to charge; exceptions being duly taken.

The character of the plaintiff's employment at the time of his injury, whether interstate or intrastate, depends upon the character of the work in which he was at that time engaged. At the time of the injury the plaintiff was employed in pumping water from the earth into a tank 1,000 feet distant, from which it would flow into locomotives, some of which, as before indicated, were engaged in interstate commerce. After the water reached the tank, the work of taking it into the engines was done by the engine crews.

In Pedersen v. Delaware, Lackawanna & Western R. Co., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153, the plaintiff was an iron worker employed by the defendant. At the time of his injury he was carrying a sack of bolts or rivets from a tool car to a bridge, to be used the next morning in work on the bridge. The court held that the plaintiff in that case was at the time of his injury engaged in work so closely related to interstate commerce as to be in practice and in legal contemplation a part of it. The point was made that the man was not at the time of his injury actually engaged in removing the old girder from the bridge and inserting the new one, but was merely carrying to the place where that work was to be done some of the materials to be used therein. This view of the matter the court declined to take saying:

> "It was necessary to the repair of the bridge that the materials be at hand, and the act of taking them there was a part of that work."

And so, in the case at bar, it was necessary to the operation of defendant's trains that the engines which haul its cars should be furnish-

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ed with water, and the plaintiff, in the act of pumping the water into the tank which was to supply the engines, was, as in the Pedersen Case, carrying to the place where the engines were to be filled "the materials to be used therein." And if the bolts not yet driven into the bridge, and not in the act of being driven in, are an instrumentality of interstate commerce, so is the water not yet put into the boilers of the locomotives, and not in the act of being placed therein, but which is in the act of being taken to where it is at once to be so used, and not on the next day, as in the Pedersen Case.

The defendant, however, relies on the case of Delaware, Lackawanna & Western Railroad Co. v. Yurkonis, 238 U. S. 439, 35 Sup. Ct. 902, 59 L. Ed. 1397. In that case the plaintiff at the time of his injury was engaged in preparing and setting off a charge of dynamite for the purpose of blasting coal and the explosive gases which had accumulated at the place where he was working suddenly ignited and exploded, and caused a squib attached to a charge of dynamite to catch fire and explode the dynamite, which caused the injuries for which the suit was brought. The plaintiff was employed in mining coal in the railroad company's colliery in the state of Pennsylvania, which coal was mined for use by it in the locomotives and engines used in its business as a common carrier in interstate commerce. The Supreme Court held that it conclusively appeared that the injury did not occur in interstate commerce. "The mere fact," said the court, "that the coal might be or was intended to be used in the conduct of interstate commerce after the same was mined and transported did not make the injury one received by the plaintiff while he was engaged in interstate commerce." And in the case at bar it was urged at the argument that upon principle we must conclude that the plaintiff, who at the time of his injury was engaged as we have said in pumping water from the earth, has no closer relationship to interstate commerce than had the plaintiff in the above case, who was mining coal which might be used in interstate commerce. "If a railroad company," counsel argued, "employed an engineer to pump water from the earth at a distance from its right of way, and transported the water by cars or a pipe line to a water tank upon its right of way, for use there upon engines engaged in interstate commerce, we would have a situation exactly like the one presented to the court in the Yurkonis Case."

That is not a fair statement of the case. In the latter case the plaintiff had no interstate employment, but was employed simply in mining coal at the mines, the use of which in interstate commerce was neither certain nor immediate. In the case at bar the plaintiff had an interstate employment in caring for and operating a plant, consisting of a tower house and instrumentalities therein, and the pump and the engine and the tank, all of which were permanent instrumentalities of interstate commerce; and the water, unlike the coal being mined, was for immediate use in interstate commerce. In order that interstate commerce might be carried on, it was necessary that there should be a water tank, and that it should be kept supplied with water for the interstate engines, and that there should be a pump house and a pump and a gasoline engine for the purpose of keeping the tank supplied

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with water, without which the interstate engines could not continue their interstate functions. All these things were necessary incidents of the interstate commerce in which the defendant was engaged. The water tank, the pump house, the pump, and the gasoline engine, used for the purpose of keeping the water tank supplied with water, were, under the circumstances, just as essential to the practical operation of the defendant's interstate commerce business as the tracks over which its trains were propelled. In filling the water tank for the immediate use of locomotives engaged in interstate commerce, the plaintiff was engaged in work so closely related to interstate commerce as to be practically a part of it, and that is sufficient to bring the case within the terms of the federal Employers' Liability Act. Shanks v. Delaware, Lackawanna & Western R. Co., 239 U. S. 556, 559, 36 Sup. Ct. 188, 60 L. Ed. 436, L. R. A. 1916C, 797.

It is said that this case is ruled by the case of Chicago, Burlington & Quincy Railroad Co. v. Harrington, 241 U. S. 177, 36 Sup. Ct. 517, 60 L. Ed. 941. In that case a wife brought the action to recover damages for the death of her husband, who was a member of a switching crew employed by the railroad company in its terminal yards at Kansas City, which is an important center for the handling of interstate and intrastate commerce, and where locomotives and cars used in both kinds of traffic are received, sent out, cared for, and repaired in the yards. At the time of his death Harrington was engaged in switching coal belonging to the railroad company, and which had been standing on a storage track for some time, to the coal shed, where it was to be placed in bins or chutes, from which it was to be supplied as needed to locomotives of all classes, whether used in interstate or intrastate traffic. The court held that Harrington, while engaged in the moving of the coal from the storage tracks, was not engaged in interstate commerce, and in so holding declared that the case was not distinguishable in principle from the Yurkonis Case, supra.

We see no distinction between the facts in the Harrington Case and the facts in the Yurkonis. In the Yurkonis Case the coal in the act of being mined had not yet become an instrumentality of interstate commerce; and after coal has been mined, and while it is being carried from one state to another, it is in interstate commerce. It ceases to be in such commerce when it reaches its destination and is left on the storage tracks for some time, as in the Harrington Case. Then the coal, being out of interstate commerce, does not again get into interstate commerce by the mere act of being moved from the storage tracks to another place on the tracks in front of the coal chutes. That was the act Harrington performed. The coal was still to be unloaded into the chutes, and with that act Harrington was not engaged. In unloading the coal into the chute, from which it was to be taken by the locomotives in interstate and intrastate commerce, it became converted into an instrumentality of interstate commerce. The act of putting the coal into the chutes from which the engines can take it is an act performed in interstate commerce, as much so as is the act of putting water into the trough by the side of the tracks to be scooped by passing engines; and we cannot distinguish the act of putting the coal into

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the coal chutes for the supply of the engines from the act of putting rails alongside of a track into which they are to be fitted or the bolts by the side of the bridge, as in the Pedersen Case. If we had the right to question, as of course we have not, the correctness of those decisions, we have no disposition to do so. But we think the cases are distinguishable from the case at bar.

In Roush v. Baltimore & Ohio R. Co. (D. C.) 243 Fed. 712, District Judge Westenhaver held, in a well-considered opinion, that an employé of an interstate railroad company, engaged in operating a pumping station, furnishing water indiscriminately and contemporaneously to locomotives engaged in interstate and intrastate commerce, is, within the federal Employers' Liability Act, being engaged at the time of the accident in interstate transportation or in work so closely related thereto as to be practically a part thereof.

In Horton v. Oregon W. R. & N. Co., 72 Wash. 503, 130 Pac. 897, 47 L. R. A. (N. S.) 8, an engineer at a station, engaged in pumping water to be used by either intrastate or interstate commerce, as the business exigencies of the defendant required, was declared to be engaged in interstate commerce. The court, answering the objection that he was not engaged in interstate commerce said:

> "Was the relation of his employment such that an injury to him tended to delay or hinder the movement of trains engaged in such commerce? There is but one answer to the question. Water to supply the engines pulling such trains had to be pumped as a necessary incident to the movement of trains. If, when he was killed, his place had not been supplied by another, the movement of trains engaged in interstate commerce conducted by the master, as well as the local trains, must have ceased altogether. * * * There can be no possible distinction in the relation to interstate commerce between the employment of the fireman who stokes the engine hauling the train so engaged and that of the man who pumps the water for the same engine. The engine would not run without the service of either. If there is a distinction, it is too fine-spun and diaphanous for ordinary perception. To hold that there is any material distinction would be as unjust as artificial. * * *"

In the Matter of Guida, 183 App. Div. 822, 171 N. Y. Supp. 285, a railroad company maintained boilers at a place in which it produced steam necessary to operate electricity producing machinery from which it supplied power to both intrastate and interstate trains. A laborer, injured while removing soot from one of the boilers, was held to be engaged in interstate commerce. The case has been affirmed by the Court of Appeals without opinion in 224 N. Y. 174, 121 N. E. 871.

[2] It is said that the plaintiff as a matter of law assumed the risk of the injury which he received. The rule of the common law is that an employé assumes the risk of the ordinary dangers of the occupation into which he enters, and also those which are known or so plainly observable that he may be presumed to know them. The federal Employers' Liability Act in section 4 (Comp. St. § 8660) abolishes the doctrine of assumption of risk in cases falling under that section, and the case at bar is not within the provision of that section. So that the doctrine is still applicable to the facts of this case. Seaboard Air Line v. Horton, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475.

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But a servant does not assume risks due to the negligence of his employer and fellow employés unless they are obvious or fully known and appreciated by him. Boldt v. Pennsylvania Railroad Co., 245 U. S. 441, 38 Sup. Ct. 139, 62 L. Ed. 385. And the question of assumption of risk is one of fact for the jury. Chesapeake & Ohio Railway Co. v. De Atley, 241 U. S. 310, 318, 36 Sup. Ct. 564, 60 L. Ed. 1016. It was properly submitted to the jury in this case, and their action respecting it is not to be disturbed.

[3] The defendant insists that there is no testimony in the case which tends to show negligence on its part. In our opinion the testimony is such as clearly justified the submission of the case to the jury. The defendant put this young man of 21 years of age in charge of a gasoline engine, without information as to the dangers incident to its operation. The plaintiff told the man who had previously been in charge that he did not even know how to set the engine going, and he asked him to explain that part of the business to him. The accident happened the first night he undertook to operate the engine after the former employé had shown him how, and he says he set the engine going in the same way he had seen it done four days before. He was never told that gasoline fumes seek lower levels, and, while he knew that gasoline was explosive, he did not know that the vapor from it was explosive. He had no knowledge or appreciation of the danger of pouring gasoline near a lantern or any fire. The jury had a right to conclude that it was negligence for the defendant to permit the plaintiff to do the work he had to do with this gasoline engine without any previous knowledge, instructions, or warnings as to these things, and without so much as inquiring whether he knew anything about them, or even whether he knew how to start the engine running. Neither the age, education nor experience of this plaintiff were such that the defendant had any right to presume knowledge on his part of the properties of gasoline and of the dangers incident thereto.

As the result of the explosion the plaintiff was terribly scarred and disfigured on his face, neck, and ears. The burns which he received are described as being of the third degree, resulting in red scar tissue which will continue during his life. This scar tissue, which is most disfiguring, extends from the right side of the face, under the chin, and up on the left side of the face and the top of the left ear. The outer lobes of one of the ears were entirely burned off. This disfigurement naturally influenced the jury in arriving at their verdict. But with the amount awarded we have nothing to do.

[4] The court, in charging on the subject of damages, was asked to charge "that any disfigurement which causes the plaintiff shame and humiliation is a measure of damages." The court, having already charged that the jury might take into consideration all the pain of body and mind the plaintiff had suffered as a direct result of the injuries he received, seemed to be in doubt, and asked counsel whether he pressed it, and counsel replied: "Yes, sir; I do." Thereupon the court said: "Then I so charge." The instruction as asked was entirely unnecessary, and the words in which it was framed were not well chosen, and we think the court might well have declined to give it on the ground

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that the subject had been sufficiently covered, inasmuch as he had already instructed that the jury could consider "all the pain of body and mind he has suffered as a direct result of the injuries he received * * * from the time of the accident to the present time, * * * all the pain and suffering, if any he will enure in the future which directly grows out of his complained-of injuries." Shame and humiliation are a part of his pain of mind. Shame and humiliation, under the circumstances shown, meant nothing more than mental anguish as resulting from and part of physical suffering. In McDermott v. Severe, 202 U. S. 600, 611, 26 Sup. Ct. 709, 713 (50 L. Ed. 1162), the court sustained an instruction, in the case of a boy who had lost a leg, that the jury could consider mental suffering, past and future, found to be the necessary consequence of the loss of his leg. "It is objected," said the court, "that this instruction permits a recovery for future humiliation and embarrassment of mind and feelings because of the loss of the leg. But we find no objection to the charge as given in this respect." And see Kennon v. Gilmer, 131 U. S. 22, 26, 9 Sup. Ct. 696, 33 L. Ed. 110.

Judgment affirmed.

HOUGH, Circuit Judge, dissents.

(259 Fed. 178)

ERIE R. CO. v. SZARY.*

(Circuit Court of Appeals, Second Circuit. February 3, 1919.)

No. 160.

COMMERCE ⟹27(7)—FEDERAL EMPLOYERS' LIABILITY ACT—INJURY IN "INTERSTATE COMMERCE."

The employé of a railroad, whose work was to supply engines with sand, and who, after having carried ashes from the drying stove to the ash pit, lost his leg when struck by a locomotive on a foggy night, *held* injured in interstate commerce, so as to entitle him to maintain action under federal Employers' Liability Act (Comp. St. §§ 8657–8665).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

In Error to the District Court of the United States for the Southern District of New York.

Action by Antoni Szary against the Erie Railroad Company. To review a judgment for plaintiff, defendant brings error. Affirmed.

The action is brought under the federal Employers' Liability Act, being Act April 22, 1908, c. 149, 35 Stat. 65, amended by Act April 5, 1910, c. 143, 36 Stat. 291 (Comp. St. §§ 8657–8665). The defendant in error, who was plaintiff below, is hereinafter referred to as plaintiff. The plaintiff in error, defendant below, is hereinafter referred to as defendant.

The facts appear in the opinion.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Certiorari granted 250 U. S. —, 39 Sup. Ct. 490, 63 L. Ed. —.

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Stetson, Jennings & Russell, of New York City (William C. Cannon, R. L. von Bernuth, and Coulter D. Young, all of New York City, of counsel), for plaintiff in error.

John C. Robinson, for defendant in error.

Before ROGERS and HOUGH, Circuit Judges, and LEARNED HAND, District Judge.

ROGERS, Circuit Judge. This is a personal injury case, in which the plaintiff has obtained a verdict for $20,000 for the loss of a leg, which resulted from injuries he received while employed by the defendant in its yards at Jersey City. The case has been brought to this court on the theory that the plaintiff was not at the time of his injury engaged in interstate commerce, and so was not entitled to maintain the action under the federal Employers' Liability Act.

It appears that plaintiff was employed as an engine sander. He prepared the sand to be used, and placed it in the engines that came into the defendant's yard and which needed it, whether such engines were engaged in interstate or intrastate commerce. An engine of ordinary size would carry about thirty pails of sand. This sand the engines had to use in order to go upgrade or over slippery tracks. In doing this work, two other men were associated with the plaintiff in his task. They did their work of preparing the sand in what is called "the sand house," a small structure standing in the yards and alongside the tracks. The sand was brought into the yard by cars every Sunday morning, and a Browning hoist lifted it from the cars into a sand bin. The plaintiff and his associates would get the sand from the bin into which it had been shoveled by a big steam shovel. The work consisted in drying the sand in four big stoves built for the purpose, and which were surrounded with what are described as "big covers," into which the sand is shoveled, and from which, as it dries, the sand gradually drops out onto the ground. The stoves are heated with soft coal, and it was in line with the plaintiff's general work to supply the coal to the stoves and to remove the ashes of the burned coal. These ashes he or his associates would take out of the stoves and carry some little distance from the sand house, to what was known as an ash pit, some 30 feet distant, where they were dumped, and to reach the ash pit it was necessary to cross some of the tracks.

On the night of the accident, January 5, 1917, the plaintiff began his usual work at 6 p. m., and put the sand into about seven engines, which he said were going to other states. He sanded the last engine that night at 9 o'clock and the accident happened half an hour thereafter. After sanding his last engine he took the ashes out of the stove and carried them over to the ash pit in a pail according to his custom, and in doing so had to cross one of the tracks. He dumped his pail and left it on the ground, while he went to the engine room to get a drink of water, and in doing so was compelled to cross a track; and, having obtained a drink, he started back to cross the track to get his pail, and in attempting to cross the track was hit by an engine. He had looked, but saw no engine, and heard no signal. The night

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he described as "very dark and very foggy and rainy and misty." The plaintiff testified that at the time he could not see anything. The steam and smoke from the engines in all parts of the yard were so thick that he could see nothing. The engine that hit him was running backwards and without a light. He was picked up and carried to a hospital, and his left leg was amputated the same night, being removed from two to three inches below the knee.

The question presented is whether the plaintiff, at the time of his injury, was engaged in interstate commerce. It will be conceded, we suppose, that workmen engaged in bolting timbers into a bridge which is a part of the line of an interstate railroad are engaged in the work of interstate commerce; and if timbers have been delivered at the bridge, which the men are actually engaged in shortening, narrowing, and thinning to make them fit the places into which they are to be bolted, such preparatory acts so far partake of the character of the final act of bolting that, if an accident happens to the men while so employed, it should be held that they were at the time engaged in interstate commerce; and if, after the work of shortening, narrowing, and thinning is done, the men collect the rubbish they have made and remove it to a dump, that act is so connected and related to the other that, if they are injured while so engaged, they would be entitled, as it seems to the writer, to recover under the federal Employers' Liability Act. The writer is unable to distinguish such a case from the case now under consideration. The act of sanding the locomotives is an act done in interstate commerce. The act of drying the sand in the stoves, performed by the same man who sands the engines and in preparation for that act, is as much related to it and as much partakes of its character as does the act of preparing the timbers to be placed in the bridge; and the act of removing the ashes is not distinguishable from the act of removing the rubbish in the case above mentioned.

It appears that, after the plaintiff had dried the sand in the stove, he sieved it and took it out of the sand house, which was a diminutive structure, a small shed, and put it into bins in a little shed next to the sand house, from which he would take it during the day and night, when he filled the sand bin in the engines. To speak of sand in these bins as being in storage, when it was used up in 24 hours is a rather exaggerated use of the term. For each night the plaintiff had ready a new supply of the sand, and whether the sand, after being heated and sieved, was permitted to lie on the floor of the sand house, or for convenience was put in a bin in an adjoining shed, is a matter of no consequence. The amount of sand needed every 24 hours by the large number of engines coming into the defendant's yards at Jersey City was so great as to keep three men busy each day in providing it, and, as each day's demand exhausted each day's supply, to claim that the sand was in storage is wholly unwarranted and without significance.

In Guida v. Pennsylvania Railroad Co., 183 App. Div. 822, 171 N. Y. Supp. 285 (July, 1918), the Appellate Division of the Supreme Court of New York held that, where a railroad company maintained boilers at Long Island station, Long Island City, in the state of New York,

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in which it produced steam necessary to operate electricity producing machinery, from which it supplied power to both intrastate and interstate trains, such boilers are indispensable instrumentalities of interstate commerce, and a common laborer, killed while removing soot from one of the boilers, was killed in interstate commerce, within the meaning of the federal Employers' Liability Act, and hence his representative was not entitled to an award under the Workmen's Compensation Law of the state of New York (Consol. Laws, c. 67). There were 36 boilers at the plant. Not all of the boilers were in use at any one time, but it was customary and necessary after a boiler had been in operation for 6 or 8 weeks to shut it down for the purpose of removing the soot from it and making needed repairs. At the time of the accident 12 of the 36 boilers had been temporarily withdrawn from service, in order that they might be freed from soot and repaired. The deceased was within one of the idle boilers, engaged in the regular course of his employment of removing soot from the boiler, when hot soot fell upon him and so badly burned him as to cause his death. The court held that the boiler plant was an instrumentality of commerce, along with the dynamos which generated the electric current, and the engines by means of which the current was made of service. The court added:

"The 12 boilers which were temporarily idle were an indispensable part of the boiler plant, as it was only by freeing them of soot, making the necessary repairs, which could be made only when the boilers had been temporarily withdrawn from active service, later substituting them for 12 boilers then in use, that the efficiency of the plant could be maintained, and the transportation system operated. Freeing the boilers of soot was as necessary to make them effective as making needed repairs. The deceased was therefore injured while engaged in restoring to efficiency one of the units of an indispensable instrumentality of interstate commerce. He was employed in interstate commerce equally with the employé who was carrying bolts with which to repair the bridge and the employé who was tamping the ties."

The case was carried to the New York Court of Appeals, which affirmed without opinion. 224 N. Y. 712, 121 N. E. 871 (November, 1918).

In Grybowski v. Erie Railroad Co., 88 N. J. Law, 1, 95 Atl. 764 (1915), the Supreme Court of New Jersey held that a person, employed by a railroad company in cleaning out an ash pit under a track into which locomotives employed in both interstate and intrastate commerce dumped ashes, was engaged in interstate commerce, as the keeping of the ash pit clean was required by both kinds of commerce, and that he was entitled to maintain an action under the federal Employers' Liability Act. Chief Justice Gummere, writing for the court, said:

"The proofs show that the ash pit was a part of the plant of the defendant company, that it was a necessary part of that plant, and that it was used both in interstate and intrastate commerce. The keeping of it clean, and thereby maintaining its effectiveness, was required equally for both kinds of commerce, just as the keeping in repair of tracks or bridges, which are used for both kinds of commerce, is a necessary incident to each of them."

The court thought the Pedersen Case, 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153, was controlling. The case

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was carried to the Court of Errors and Appeals, and was affirmed (89 N. J. Law, 361, 98 Atl. 1085) upon the reasons stated in the opinion below; 12 judges voting for affirmance, and none for reversal.

I am unable to see how, if the cases cited were correctly decided, this court can hold that the plaintiff herein is not entitled to maintain this action. The stove in which the sand was dried was an instrumentality of interstate commerce and an essential part of defendant's plant, and no sufficient distinction favorable to the defendant can, in my opinion, be made between cleaning out the soot from the boilers in the New York case and the removal of the ashes from the ash pit into which they were dumped by engines used in interstate and intrastate commerce in the New Jersey case, on the one hand, and the removal in the instant case, on the other, of the ashes arising from the drying of the sand. The man who dried the sand was the very man who sanded the engines. The man who removed the soot from the boilers is not shown to have had any other connection with the direct operation of the trains, and the same may be said as to the man who removed the ashes from the ash pit.

My Associates agree that this case must be affirmed because in their opinion it is not distinguishable from the case of Erie Railroad v. Collins, 259 Fed. 172, 170 C. C. A. 240, decided at this term, when the court was differently constituted, and which at this date is not yet reported. It is said that this case and the Collins Case are not distinguishable in principle from the Harrington Case, 241 U. S. 177, 36 Sup. Ct. 517, 60 L. Ed. 941. In the Collins Case this court expressed its understanding of that case, and it is not necessary to repeat now what was there said.

Judgment affirmed.

LEARNED HAND, District Judge (concurring). The case of Collins v. Erie Railroad Co. is in my judgment quite indistinguishable from the case at bar. It was argued earlier than this case, before a court differently organized, and was in fact decided earlier, though the decision had not been handed down. It seems to me that it should control here, and I agree to affirm upon its authority. As a matter of first impression, I confess I should have thought both cases within the doctrine of C., B. & Q. R. R. Co. v. Harrington, 241 U. S. 177, 36 Sup. Ct. 517, 60 L. Ed. 941.

HOUGH, Circuit Judge. I agree to affirmance for the reasons above stated. Judge HAND'S memorandum also sufficiently indicates the ground of my dissent in the Collins Case.

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(259 Fed. 183)

BALLAINE v. ALASKA NORTHERN RY. CO. (UNITED STATES, Intervener).

(Circuit Court of Appeals, Ninth Circuit. July 7, 1919.)

No. 3158.

RAILROADS ⟹5½, New, vol. 6A Key-No. Series—ACTIONS AGAINST GOVERNMENT OWNED CORPORATION.

The United States, by the purchase of the real and personal property, stock, and bonds of the Alaska Northern Railway Company, under authority of Act March 12, 1914 (Comp. St. §§ 3593a–3593d), became the owner, not only of the property, but of the corporation as its agent for governmental and public purposes, and without its consent the corporation cannot be sued in tort.

In Error to the District Court of the United States for the Third Division of the Territory of Alaska; Fred M. Brown, Judge.

Action by Frank L. Ballaine against the Alaska Northern Railway Company, in which the United States intervened. Judgment for defendant, and plaintiff brings error. Affirmed.

For opinion below, see 5 Alaska, 694.

On April 29, 1915, in the District Court for the Territory of Alaska, Third Division, the Alaska Northern Railway Company sued the Alaska Central Railway Company and Frank L. Ballaine to declare a trust for the use of the Alaska Northern Railway Company in and to certain real estate at Seward, Alaska, the legal title to which was in Frank L. Ballaine. In November, 1915, after trial, the court dismissed the action, with costs to the defendant therein. Thereafter, on June 24, 1916, Ballaine brought the present action against the Alaska Northern Railway Company to recover damages on the ground that the suit heretofore mentioned was maliciously instituted without probable cause. The railway company pleaded that the property of the corporation at the time the action was brought was owned by the United States, and that in the former suit the company had acted in good faith on the advice of counsel. Ballaine by reply put in issue the defense of advice by counsel.

Thereafter on October 23, 1916, the United States, by leave of court, intervened and set up that on April 6, 1915, under the Alaska Railroad Act, approved March 12, 1914, the United States had contracted in writing with certain proper parties for the purchase of the railway and the real and personal property of the Alaska Northern Railway Company, and all the stocks and bonds of that corporation; that such agreement "expressly excluded from the purchase made by the United States of America from the Alaska Northern Railway Company any claims of the Alaska Northern Railway Company or of the vendors in said agreement against any person or persons whomsoever, with reference to the title of the Seward townsite, otherwise known as United States surveys 726 north and south, of all of which facts plaintiff had due notice"; that the United States has paid in full all moneys agreed by it to be paid under the agreement, and was a bona fide purchaser, owner, and holder of the stocks, assets, and bonds of the railway company, and has taken charge and controlled the road in behalf of the United States, and that the United States never has had any interest in the litigation commenced by the Alaska corporation on April 29, 1915, against Ballaine and others; and that that suit was commenced and prosecuted solely for and in behalf of the former trustees and owners of the Alaska Northern Railway Company. In due course Ballaine answered, and set up that the Alaska Northern Railway Company was operating and maintaining the railroad and that a corporate organization was then in existence; that the United States, through the Secretary of the Interior, knew of the claim of Ballaine against the railway company for damages for alleged malicious prosecution prior to the final payment by the United States for the stocks and bonds of the defendant corporation;

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that the United States has not exercised any of the rights of sovereignty in the conduct, operation, and maintenance of the Railway Company, but is engaged in a commercial business in the operation and conduct of the railway, and acquired the assets of the corporation subject to the unliquidated claim of Ballaine for damages sustained by reason of the acts of the former board of directors of the railway company.

The United States demurred to this answer to the complaint in intervention, and on December 3, 1917, the District Court dismissed the complaint of Ballaine against the Alaska Northern Railway Company, upon the ground that Ballaine's action was one sounding in tort, and that the real party defendant is the United States, and that there was no jurisdiction to proceed with the cause. Ballaine then sued out a writ of error.

L. V. Ray, of Seward, Alaska, for plaintiff in error.

William A. Munly, U. S. Atty., of Valdez, Alaska, and Annette Abbott Adams, U. S. Atty., of San Francisco, Cal., for defendant in error and intervener.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). The authority of the United States to acquire the railroad came from the Act of Congress approved March 12, 1914, c. 37, 38 Stat. 305 (Comp. St. §§ 3593a–3593d), entitled "An act to authorize the President of the United States to locate, construct, and operate railroads in the territory of Alaska, and for other purposes." The Secretary of the Interior, acting by authority of the President, made the written agreement of April 6, 1915, and one of later date for the purchase of the real and personal property of the railway company and of all the stocks and bonds of the corporation. The purpose of the agreement was to secure to the United States entire control and ownership, excluding, however, from the property purchased, any claims of the railway company or the vendors against persons with reference to title to the Seward townsite. Thus while, as between the United States and the railway corporation and its vendors, the United States became the owner of the railroad and stock, it did not purchase any claim that the railroad company had against Ballaine for any matter pertaining to the title to the Seward townsite; and Ballaine knew of this agreement. If, under the situation, Ballaine can proceed with this action, and should recover a judgment against the railroad company, he would look for satisfaction to the property held in the name of the corporation. That property, however, is now owned by the United States; hence, if seized on execution, we would have a judgment creditor in an action in tort interfering with the property owned by the United States, held, it is true, in the name of the railroad company, yet so held for account of the United States by and through an agency in the form of a corporation. That the United States cannot be sued for a tort, even though committed by its officers in the discharge of their official duties, is thoroughly well settled. Peabody v. United States, 231 U. S. 530, 34 Sup. Ct. 159, 58 L. Ed. 351; Smith v. Reeves, 178 U. S. 436, 20 Sup. Ct. 919, 44 L. Ed. 1140; Occidental Co. v. United States, 245 Fed. 817, 158 C. C. A. 157; Smith v. Rackliffe, 87 Fed. 964, 31 C. C. A. 328.

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To overcome the application of the rule, plaintiff in error argues that in the operation and maintenance of the railroad the United States is carrying on a commercial business, and in such business has, to an extent, abandoned its sovereign capacity. We cannot uphold that view. Congress, in its power to regulate commerce, could construct, or could authorize a corporation or individuals to construct, a railroad, or to buy a railroad, and clearly in the territories has a plenary power to grant franchises, to create a railroad system, and to employ the agency of a corporation as a means of accomplishing such objects. California v. Pacific R. R. Co., 127 U. S. 1, 39, 8 Sup. Ct. 1073, 32 L. Ed. 150. In Luxton v. North River Bridge Co., 153 U. S. 525, 14 Sup. Ct. 891, 38 L. Ed. 808, the court held that Congress could create corporations as appropriate means of executing the powers of government, as, for instance, a railroad corporation, for the purpose of promoting commerce among the states. Indiana v. United States, 148 U. S. 148, 13 Sup. Ct. 564, 37 L. Ed. 401. The Act of March 12, 1914, c. 37, heretofore cited, which authorizes the President to locate, construct, and operate railroads in Alaska, expressly provides that the Alaska railroad is for the settlement of public lands and for transportation of coal for the army and navy, for the transportation of troops, arms, munitions of war, the mails, and for "other governmental and public uses," and to transport passengers and property. The act (section 4) also confers authority upon the President, through such agents as he may appoint or employ, to do all necessary acts, in addition to those specially authorized, to enable him to accomplish the purposes of the act. By section 1 the President is authorized to purchase or acquire other railroads to carry out the purposes of the act, and to employ officers and agents in order to accomplish the purpose of the legislation. Taking all these provisions together, they plainly show that the United States, in acquiring the stocks and bonds and property of the Alaska Northern Railway Company, acted in its sovereign capacity, and in exercising entire control, possession, ownership, and management, has merely employed the corporate organization as an agency through which to execute the purposes of the statute.

Instances of where a state government was carrying on a private enterprise, but where it was held that a suit could not be maintained against the objection of the state, are found in Murray v. Wilson Distilling Co., 213 U. S. 151, 29 Sup. Ct. 458, 53 L. Ed. 742, and Cunningham v. Macon & New Brunswick R. R. Co., 109 U. S. 446, 3 Sup. Ct. 292, 609, 27 L. Ed. 992. Salas v. United States, 234 Fed. 842, 148 C. C. A. 440, cited by plaintiff in error, is to be distinguished. There Burke and Salas were indicted for conspiring to defraud the United States. The United States owned all of the stock of the Panama Railroad Company, and through the Isthmian Canal Commission and its subsistence department food supplies were furnished to the employés on the Isthmus and to the commissary department of the railroad company, which bought and furnished all other supplies. Burke was manager of the commissary department of the railroad. The Court of Appeals was of opinion that the United States had entered into commercial business in the premises and was to be treated

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like any other corporation, and that the combination proved on the trial was not one intended to defraud the United States. Here, however, the United States holds the railroad and stock for public purposes under clear statutory authority, and it operates the road in the necessary discharge of its duty to the public, and in our judgment, in this, a civil action, can claim the privileges and immunities of a sovereign. See authorities heretofore cited; Murray v. Wilson Distilling Co., 213 U. S. 151, 29 Sup. Ct. 458, 53 L. Ed. 742.

Our opinion is that the United States has, by the pleadings, shown itself to be the real party in interest, and can claim the immunity set up in the complaint in intervention.

The judgment is affirmed.

(259 Fed. 186)

HOYT et al. v. ZIBELL.

In re GLASS et al.

(Circuit Court of Appeals, Seventh Circuit. April 2, 1919.)

No. 2640.

1. BANKRUPTCY ⟹188(1)—PRIORITY OF LIENS—RIGHTS OF ANCILLARY RECEIVER.

   Under Bankruptcy Act July 1, 1898, § 47a, as amended by Act June 25, 1910, § 8 (Comp. St. § 9631), the rights of an ancillary receiver are those of an execution creditor, and the priority rights of such creditors as against claims for superior liens must be determined by the laws of the state where the execution is levied.

2. CHATTEL MORTGAGES ⟹217—EXTRATERRITORIAL EFFECT—RULE OF COMITY.

   Generally a chattel mortgage, which in the state where made is a valid prior lien upon property there situate, through comity between the states will be to the same extent a lien upon the same chattels when brought into another state; and this rule is recognized by the courts of Illinois.

3. CHATTEL MORTGAGES ⟹217—LIENS—REMOVAL OF PROPERTY TO ANOTHER STATE.

   That a chattel mortgagee knew that the property had been removed from Indiana to Wisconsin *held* not to deprive him of the right to assert the validity and priority of his lien under the law of Illinois, to which state the property had been taken without his knowledge.

Petition to Review and Revise Order of the District Court of the United States for the Eastern Division of the Northern District of Illinois.

In the matter of Louis Glass and another, bankrupts. Petition of J. M. Hoyt, C. B. Little, and L. A. Stebbins, trustees, to review an order in favor of William Zibell, ancillary receiver. Reversed.

Petitioners' chattel mortgage on the auto truck in question was duly executed and recorded in Lake county, Ind., where the mortgagor then resided and the truck was located. In August, 1917, the mortgagor permanently left Indiana, going into business at Kenosha, Wis., taking the mortgaged truck with him, and keeping and using it there, and obtaining credit on the strength of his statement to commercial agencies that he owned this truck, among other property, unincumbered. In November his business at Kenosha burned, and he came to Chicago, bringing the truck with him. Shortly afterwards involuntary proceedings in bankruptcy were commenced against the mort-

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gagor and another in Wisconsin, and an ancillary receiver was appointed in Illinois, who seized the truck. Petitioners herein thereupon asked the District Court of Illinois to recognize the mortgage as a superior lien on the truck for the entire balance of the mortgage debt, about $500.

The mortgage was a valid lien under the laws of Indiana, and provided, inter alia, that the truck should not be removed from Lake county, and gave the mortgagees right of immediate foreclosure in case of default in any of the covenants of the mortgage. The mortgagees at no time consented to the removal of the truck from Lake county, but became aware it was at Kenosha, and received from that place one or more deferred payments, the last, a partial payment, made the latter part of October. But it does not appear that the mortgagees had any knowledge of the removal of the mortgagor or the truck from Kenosha to Chicago until after the ancillary receiver had taken it, and just before the petition in the District Court was filed asserting the lien. There was no record of the mortgage in Wisconsin or Illinois. The facts were all stipulated. The special master, to whom the matter was referred, found against the alleged superior lien of the mortgage, and recommended the dismissal of the petition, and decree accordingly was entered, which is challenged by this proceeding.

A. J. Deutschman, of Chicago, Ill., for petitioner.
Harold F. White, of Chicago, Ill., for respondent.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

ALSCHULER, Circuit Judge (after stating the facts as above). [1, 2] Under Bankruptcy Act July 1, 1898, c. 541, § 47a, 30 Stat. 557, as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (Comp. St. § 9631), the rights of the ancillary receiver are those of an execution creditor, and it is well settled that the priority rights of such creditors as against claims for superior liens must be determined by the laws of the State wherein the execution is levied. Green v. Van Buskirk, 5 Wall. 307, 18 L. Ed. 599; Hervey v. R. I. Locomotive Works, 93 U. S. 664, 23 L. Ed. 1003; Corbett v. Riddle, 209 Fed. 811, 126 C. C. A. 535 (4th C. C. A.). The weight of authority is that in general a mortgage, which in the state of its making is a valid prior lien upon chattels there situate, through comity between the states will be to the same extent a lien upon the same chattels when they are brought into another state. See cases cited thereon: 11 Corpus Juris, 424; 64 L. R. A. 356, note 2; Shapard et al. v. Hynes et al., 104 Fed. 449, 45 C. C. A. 271. A state may by appropriate action declare it to be contrary to its policy to thus give extraterritorial effect to such liens created in other states, but this is not effected by merely prescribing the essential prerequisites to valid chattel mortgage liens given within the state. Shapard et al. v. Hynes et al., supra.

There is no statutory provision in Illinois abrogating or contravening the general rule of comity as stated, and the courts of that state long since declared adherence to the rule. In Mumford v. Canty, 50 Ill. 370, 99 Am. Dec. 525, the question was one of priority as between a valid mortgage on chattels in Missouri and an Illinois judgment levied on the chattels which had been brought into Illinois, where credit had been extended to the debtor on account of his supposed unincumbered ownership of the chattels. The court held that the case must be governed by the rule of comity, and that the Missouri chattel mortgage was a lien on the chattels superior to the Illinois levy, and the rule of

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comity has since been repeatedly recognized in the Illinois courts. Shannon v. Wolf, 173 Ill. 253, 50 N. E. 682; Bridges v. Barrett, 126 Ill. App. 122; Armitage v. Potter, 93 Ill. App. 602; Bank v. Arnold, 58 Ill. App. 349; Clough v. Kynes, 40 Ill. App. 234; Waters v. Cox, 2 Ill. App. 129.

The case of Dawes v. Rosenbaum, 179 Ill. 112, 53 N. E. 585, which, in the District Court, seems to have been considered as having "controlling influence" (as stated in the report of the master) as a holding by the Illinois Supreme Court to the contrary, and is here urged to like purpose for respondent, is not in conflict. Indeed, the subject was not referred to in the opinion of the Supreme Court in that case. The statement of facts preceding the court's opinion sets out in full the opinion of the Appellate Court, followed by the Appellate Court's finding of the facts. The Appellate Court opinion, as well as its finding of facts, shows that the case was there decided wholly on the question of the sufficiency of the proof of conversion to sustain the action of trover, and that court, having decided the case upon that ground alone, proceeded to say:

"In view of what has been said, we do not deem it necessary to pass specifically upon the errors assigned in relation to propositions of law held and refused. We cannot conclude this opinion, however, without some suggestions as to the rule, apparently supported by numerous adjudications, that the constructive notice of a mortgage, resulting from its acknowledgment and recording in the state in which it is executed, is also constructive notice in other states, and to the citizens of other states to which the mortgaged property may be removed, thus giving to the law of the state in which the mortgage is executed extraterritorial effect."

The opinion then states some very cogent reasons why, under the circumstances of that case, where the chattels were live stock brought to Chicago for sale in the open market, the rule should be changed—presumably by appropriate legislation. So even this dictum of the Appellate Court does not dispute, but clearly recognizes, the validity of the rule in Illinois. The opinion of the Supreme Court, however, does not touch upon the question of comity, and the only matter by it considered was that of the sufficiency of the demand to establish the conversion. Whatever might be our own view as to the wisdom of the rule, or the propriety of the exception to its application suggested in the Appellate Court opinion, it is sufficient to say that it is the accepted rule in Illinois, and must be given effect.

[3] It seems to be quite definitely settled, however, that where mortgaged chattels are by the mortgagee or with his consent sent into another state, it is at the risk of the accrual there of liens which, while the chattels remain in such state, will be superior. Hervey v. R. I. Locomotive Works, supra. Respondent contends that this is here the case. The only record fact which might tend to support such contention is that during the months of September and October petitioners knew that their mortgagor had left Lake county and removed the truck to Kenosha, from which place some payments had been sent. Other than this, the stipulation states:

"Respondent admits that said removal was without the knowledge or consent of the petitioners, and that at no subsequent time did petitioners consent to said removal."

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Of the removal from Kenosha to Chicago it does not appear petitioners had any knowledge whatever. Without determining whether the superior lien of the Indiana mortgage would have become subject to that of an execution levied on the truck while in Wisconsin, where the mortgagees knew the truck had been brought, the fact that, when the bankruptcy proceedings were begun and the truck was seized by the ancillary receiver, it was in Illinois, without consent or knowledge of the mortgagees, leaves them free to enforce the mortgage in Illinois as a lien upon the truck, superior to the claim of the ancillary receiver.

In Armitage v. Potter, supra, there were strikingly similar facts. The mortgaged property was with the mortgagees' consent taken from the state where the mortgage was given to Wisconsin, and thence, without the mortgagees' knowledge, to Illinois, where under the comity rule the mortgage lien was by the Illinois court held paramount to that of an Illinois execution levied on the chattels. Under the facts which this record discloses it cannot be held that the lien of this valid Indiana mortgage, which by comity would be recognized and enforced in Illinois as against execution creditors there, became lost merely because the mortgagees became aware that the truck had been first taken to Wisconsin.

The order of the District Court is reversed, with direction to accord the mortgagees priority upon the truck over the ancillary receiver, for the unpaid mortgage debt.

(259 Fed. 189)

SCHULZE v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. July 7, 1919.)

No. 3298.

1. WAR ⟹4—ESPIONAGE ACT—INTENT—"SUPPORT"—"FAVOR" OR "OPPOSE."
Under Espionage Act, § 3, as amended by Act May 16, 1918, § 1 (Comp. St. 1918, § 10212c), declaring a punishment for, by word or act, supporting or favoring the cause of any country with which the United States is at war, or opposing the cause of the United States therein, intent is a part of the offense; mental attitude being implied in the words "support," "favor," and "oppose."
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Favor Support; First Series, Oppose.]

2. WAR ⟹4—ALLEGING INTENT—ESPIONAGE ACT.
The offense under Espionage Act, § 3, as amended by Act May 16, 1918, § 1 (Comp. St. 1918, § 10212c), of by word or act supporting or favoring the cause of a country with which the United States is at war, or opposing the cause of the United States therein, being one whose definition necessarily includes intent, indictment therefor need not allege intent, but only the acts done.

3. CRIMINAL LAW ⟹371(1)—EVIDENCE—INTENT.
Intent being part of the offense, evidence of other acts or words of defendant than those charged are admissible to show his attitude of mind and intent or purpose.

4. CRIMINAL LAW ⟹786(3)—INSTRUCTIONS—INTEREST OF DEFENDANT.
Instruction that the interest of defendant in the result should be considered in weighing his testimony, and in determining how far, or to what extent, if at all, it is worthy of credit, is proper.

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5. CRIMINAL LAW ⟹757(1)—INSTRUCTION—CREDIBILITY OF STATE WITNESSES.
Instruction that the court sees no reason why the government witnesses should not be believed, but telling the jury that they are the exclusive judges as to the credibility of witnesses and the weight of the evidence and of the facts, does not go beyond the rule of permissible comment in a federal court.

In Error to the District Court of the United States for the Southern Division of the Southern District of California; Oscar A. Trippet, Judge.

Charles G. Schulze was convicted of violation of the Espionage Act (253 Fed. 377), and brings error. Affirmed.

A. J. Morganstern, of San Diego, Cal., for plaintiff in error.

Robert O'Connor, U. S. Atty., and W. F. Palmer, Asst. U. S. Atty., both of Los Angeles, Cal.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The plaintiff in error was convicted under an indictment which charged him with violation of that portion of the espionage statute (Act June 15, 1917, c. 30, tit. 1, § 3, 40 Stat. 219), as amended by Act May 16, 1918, c. 75, § 1, 40 Stat. 553 (Comp. St. 1918, § 10212c), which provides:

"Whoever shall by word or act support or favor the cause of any country with which the United States is at war or by word or act oppose the cause of the United States therein"

—shall be punished as provided in the act. The offense was charged to have been committed by knowingly, willfully, unlawfully, and feloniously uttering in the hearing of another person named certain statements friendly to Germany and hostile to the United States, which need not be here repeated. The writ of error presents two questions for review:

[1-3] First, the alleged error of admitting testimony of witnesses as to other prior statements made by the accused, for the purpose of showing the intent with which the statements referred to in the indictment were uttered. The plaintiff in error contends that intent is no part of the offense as described in the statute, and that therefore such evidence was inadmissible. We cannot agree that intent is no part of the offense. The very description of the offense involves the mental attitude of the accused—his taking his stand with the enemy and against the United States. That mental attitude is necessarily implied in the words "support," "favor," and "oppose," which include both act and intent. Under an indictment brought under the same statute Judge Westenhaver, instructing the jury, said:

"It is necessary that you should find from the evidence, beyond a reasonable doubt, that by these words the defendant willfully intended to support or favor the cause of the Imperial Government of Germany with which the United States was then at war, or to oppose the cause of the United States." Department of Justice, Bulletin No. 143.

A similar instruction was given by Judge Cochran. Bulletin No. 149.

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It is true that in charging the offense it is unnecessary to allege the intent; the offense being one whose very definition necessarily includes intent. In such a case it is necessary only to aver in apt terms the acts done. The intent will be inferred. The charge is not unlike that of treason, the indictment for which needs go no further than to follow the language of the statute which defines the offense. (United States v. Greathouse, 2 Abb. U. S. 364, Fed. Cas. No. 15,254), and it logically follows that to prove an offense such as is charged here the same rule should apply as in prosecutions for treason, and that evidence may be received of other acts or words of the defendant to show his attitude of mind and his intent or purpose (United States v. Lee, 2 Cranch, C. C. 104, Fed. Cas. No. 15,584; Respublica v. Roberts, 1 Dall. [Pa.] 39, 1 L. Ed. 27; Fries' Case, Fed. Cas. No. 5,126; Respublica v. Malin, 1 Dall. 33, 1 L. Ed. 25; United States v. Hanway, 2 Wall. Jr. 139, Fed. Cas. No. 15,299; Charge to Grand Jury, 2 Wall. Jr. 134, Fed. Cas. No. 18,276; Charge to Grand Jury, 5 Blatchf. 549, Fed. Cas. No. 18,271. Not dissimilar in principle are Higgins v. State, 157 Ind. 57, 60 N. E. 685, and cases there cited. We find no error in the admission of the testimony.

[4, 5] The second question is whether the court, in charging the jury, erred in expressing opinion on the credibility of witnesses and upon the facts involved in the case. The question whether the plaintiff in error uttered the words which are set forth in the indictment was the main issue in the case. He testified that he made no such statements, and two witnesses for the government testified that he did. Concerning his testimony the court instructed the jury:

"The deep personal interest which he may have in the result of the suit should be considered by the jury in weighing his evidence, and in determining how far, or to what extent, if at all, it is worthy of credit."

Concerning the testimony of the witnesses for the government the court said:

"In regard to the interest of the witnesses in the case, I think it is my duty to call your attention to the evidence of Miss Winters in this regard, and ask you to consider, in weighing her evidence, what interest she has in this case. Why should she inform against the defendant? Why should she take the interest in this case she has taken? Has she any object in accusing this man of this very grave offense? Has there been any reason shown that would cause her to testify falsely in the case? Take the case of Mrs. Richards. What interest has she in the case? Why should she testify falsely, if she did, in order to get this defendant into trouble? * * * It seems to me that the testimony of these two witnesses has been given so clearly, and so positively, and under circumstances where the conversation could be so easily understood, that they could not have testified under a mistaken belief as to the material part of their testimony. They may have been mistaken as to some small part of the conversation; but taken as a whole, it seems to me they could not have been mistaken. This case turns largely upon the testimony of Miss Winters and Mrs. Richards. No one else heard the conversation with this defendant, except these two witnesses. The defendant has denied the conversation that these two ladies have testified to. To me these two witnesses appeared to be fair in their testimony, they look like intelligent, honorable women, and I see no reason why they should not be believed. Now, while I have so commented upon these two witnesses and their testimony, I advise you again that you are not bound by what I say in this regard; you are the exclusive judges as to the credibility of witnesses and the weight of the evidence and are sole judges of the facts."

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The instruction as to the defendant's interest in the case as affecting his credibility is justified by Reagan v. United States, 157 U. S. 301, 15 Sup. Ct. 610, 39 L. Ed. 709, where the identical instruction was approved. Nor are we convinced that the instruction upon the testimony of the two witnesses for the government went beyond the rule of permissible comment in a federal court. Said the court in United States v. Reading Railroad, 123 U. S. 113, 8 Sup. Ct. 77, 31 L. Ed. 138:

"Trial by jury in the courts of the United States is a trial presided over by a judge, with authority, not only to rule upon objections to evidence, and to instruct the jury upon the law, but also, when in his judgment the due administration of justice requires it, to aid the jury by explaining and commenting upon the testimony, and even giving them his opinion upon questions of fact, provided only he submits those questions to their determination."

And in Simmons v. United States, 142 U. S. 148, 155, 12 Sup. Ct. 171, 173 (35 L. Ed. 968), the court said:

"It is so well settled, by a long series of decisions of this court, that the judge presiding at a trial, civil or criminal, in any court of the United States, is authorized, whenever he thinks it will assist the jury in arriving at a just conclusion, to express to them his opinion upon the questions of fact which he submits to their determination, that it is only necessary to refer to two or three recent cases in which the judge's opinion on matters of fact was quite as plainly and strongly expressed to the jury as in the case at bar. Vicksburg, etc., Railroad v. Putnam, 118 U. S. 545 [7 Sup. Ct. 1, 30 L. Ed. 257]; United States v. Philadelphia & Reading Railroad, 123 U. S. 113 [8 Sup. Ct. 77, 31 L. Ed. 138]; Lovejoy v. United States, 128 U. S. 171 [9 Sup. Ct. 57, 32 L. Ed. 389]."

The judgment is affirmed.

(259 Fed. 192)

KAMMANN v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. May 8, 1919.)

No. 2665.

WAR ⟹4—ESPIONAGE ACT—TRIAL—EVIDENCE.

On trial of a defendant charged with violation of Espionage Act, title 1, § 3 (Comp. St. 1918, § 10212c), by willfully making false statements with intent to interfere with the operation and success of the military forces of the United States, admission of evidence of expressions of defendant before the United States was at war, though showing a siding with Germany as against the Allies, *held* error.

In Error to the District Court of the United States for the Northern Division of the Southern District of Illinois.

Criminal prosecution by the United States against Charles H. Kammann. Judgment of conviction, and defendant brings error. Reversed.

R. H. Radley and John Dailey, both of Peoria, Ill., for plaintiff in error.

Edward C. Knotts, of Carlinville, Ill., and John Dougherty, of Peoria, Ill., for the United States.

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Before BAKER and EVANS, Circuit Judges, and FITZHENRY, District Judge.

BAKER, Circuit Judge. Under an indictment containing 20 counts plaintiff in error was convicted of violating Act June 15, 1917, c. 30, tit. 1, § 3, 40 Stat. 219 (Comp. St. 1918, § 10212c). Ten counts set forth "false statements willfully made with intent to interfere with the operation and success of the military forces of the United States." The other 10 alleged that the same utterances were "willful attempts to cause insubordination, disloyalty, mutiny, and refusal of duty in the military forces."

Kammann was 56 years old at the time of the trial, born in Germany, and brought here at the age of two. His father was naturalized in 1871, thereby conferring citizenship upon the son. Graduate of the University of Illinois. For the 27 years preceding his indictment he was a teacher, and for several years one of the principals in the public schools of Peoria, Ill. For several years prior to the war he had been president of the Peoria chapter of the German-American Alliance, an organization specially chartered by Congress. Long before he was indicted the Peoria chapter was closed and the funds in the treasury were divided between the Red Cross and the Liberty Loan.

As a teacher of history to boys and girls from 12 to 15 years of age, in the classroom, and frequently in response to questions concerning current events, he made the statements between January and December, 1917, on which the indictment is predicated.

We have compared each alleged false statement with the evidence, and fail to find any ground on which the conviction can be sustained. As illustrative of the whole record, we set forth some of the strongest charges.

"It is all nonsense to talk about 'getting the Kaiser.' We might just as well talk about getting the President." Several pupils testified that substantially such a statement was made in class. Some of them did not remember the occasion or the context. Others did, and disclosed that the occasion was an inquiry by one of the boys about the slogan "Get the Kaiser," and the context was: "Getting the Kaiser would not end the war. This is a war of nations, and does not depend on getting anybody, whether the Kaiser, the President, or the Czar."

If false at all, it was a false opinion, not a false statement or report of fact. No evidence that it was false as a matter of opinion. No evidence that the pupils ever communicated, or that Kammann instructed or desired them to communicate, the statement to any of the military or naval forces of the United States. If such a statement might be deemed to have a tendency to discourage those little lads from enlisting or responding to call when they should reach military age, it is enough to note that the indictment contains no charge of "willful obstruction of the recruiting or enlistment service, to the injury of the service." This statement and likewise the others are isolated from context and occasion in the indictment; in

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the proofs the background of these classroom utterances is illuminated by testimony of the pupils that Kammann in the same talks said to them:

"You children should be patriotic." "We are the strongest and best nation on earth." "It is the duty of all persons, no matter where they come from, to be loyal to this country," etc.

Testing the record by the rule that "the question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent" (Schenck v. United States [March 3, 1919] 249 U. S. 47, 39 Sup. Ct. 247, 63 L. Ed. 470), we hold that no evidence was presented to the jury on which a finding could lawfully be based that Kammann willfully made false statements with intent to interfere with the operation or success of the military or naval forces or willfully attempted to cause insubordination or disloyalty among such forces.

"If we had stayed off the sea, we would not have gotten into the war."

"The Kaiser could not start the war without a vote of the Reichstag."

"We should not have sent munitions to the Allies. If we had not done so, we could have kept out of the war. Our sending munitions over there got Germany mad, and for that reason she went on sinking our ships, and this brought us into the war."

"General Lee said he could defeat the federal army in the Civil War if the Germans were out of it."

"If the Germans in this county had known that this country was to declare war against Germany, the Germans would have done differently in the Civil War."

"If Germany had not helped us in the Revolutionary War, we should have been defeated."

"The Allies cannot defeat Germany unless they starve the Germans out."

"The Kaiser was not to blame for the war."

"The Kaiser has not as much power as the President."

If any of these statements is more than an expression of opinion, the circumstances of their use did not create a clear and present danger of mutiny in our army or of other interference with our military operations.

These statements were made in class between January and December, 1917. In many instances the testimony of the pupils left the matter undeterminable whether the utterances were made before or after this country came into the war. In addition to this evidence of statements made while we were neutral, evidence was admitted of somewhat similar expressions in 1915 and 1916.

It is unnecessary in this case to measure the limits of the admissibility of evidence of prior acts or utterances similar to the acts or utterances charged in the indictment, as discussed in 1 Wigmore, §§ 300–306, 3 Greenleaf (15th Ed.) § 15, 1 Jones, § 144, 16 Corpus Juris, 586, and 7 Ency. of Evidence, pp. 629, 633; for the gist of the indictable offense here was the criminal intent to interfere with our military operations or to cause insubordination among our military forces. While we were neutral, Kammann's "mental attitude," as the trial court characterized the effect of this evidence, was no more an offense than was the "mental attitude" of other American citizens

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who expressed their belief in the cause of the Allies. Of course no one can lawfully be convicted under the act of June 15, 1917, merely on account of his "mental attitude" (proven necessarily by his expressions) since that date. But if there was a prima facie case to go to the jury, it is apparent how damaging it would be to allow a close or doubtful case to be bolstered up with proof of expressions which are not fairly attributable to an intent or a willingness to interfere with our military operations or to cause insubordination among our military forces as proof of an intent to violate those commands of the espionage act when it should come to be enacted. That would virtually be giving an ex post facto effect to the statute itself.

We hold that the evidence of Kammann's expressions while we were neutral, though showing a siding with Germany as against the Allies, could not fairly be attributed to an intent or a willingness to interfere with our military operations or to cause insubordination among our military forces, and its admission was prejudicial error.

The judgment is reversed for further proceedings not inconsistent with this opinion.

(259 Fed. 195)

BISHOP v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. June 30, 1919.)

No. 3279.

1. INTOXICATING LIQUORS ⚷229—TRANSPORTATION INTO PROHIBITION STATE —EVIDENCE.

   Testimony that the owner of whisky was expected, by those taking it by boat from Missouri down the Mississippi, to meet them at one of two points in Tennessee, with two trucks on which to unload it, was evidence that it was intended for transportation into Tennessee, for permanent stay there, in violation of Act March 3, 1917, § 5 (Comp. St. 1918, § 8739a).

2. CRIMINAL LAW ⚷418(2)—EVIDENCE—UNCONTRADICTED STATEMENT IN DEFENDANT'S PRESENCE.

   Statement of helper, in presence of owner of boat, and not questioned by him, when officers came on board and asked the destination of whisky thereon, that they expected the owner of the whisky to meet them at one of two points in Tennessee with two trucks on which to unload it, is admissible against the boat owner, prosecuted for transporting the whisky into Tennessee in violation of Act March 3, 1917, § 5 (Comp. St. 1918, § 8739a).

3. STATES ⚷12(2)—BOUNDARY—NAVIGABLE STREAM.

   Relative to transporting whisky into Tennessee from Missouri, in violation of Act March 3, 1917, § 5 (Comp. St. 1918, § 8739a), in the absence of evidence of avulsion, the middle of the navigable channel of the Mississippi as it then existed is to be taken as the state line.

4. CRIMINAL LAW ⚷862—INFERENCES BY JURY—COMMON KNOWLEDGE AS BASIS.

   Merely from the common knowledge regarding the nature of the Mississippi and its winding channel, the jury would be entitled to infer that a considerable part of the journey down it, for over 100 miles constantly opposite Tennessee, of defendant's light draft small power boat, the natural effort of which would be to make as straight a course as possible, had been within the limits of Tennessee.

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5. INTOXICATING LIQUORS ⟹236(1)—TRANSPORTATION INTO PROHIBITION STATE—EVIDENCE.

Evidence *held* to support conclusion that defendant had actually transported liquor across the state line in the Mississippi into Tennessee, and with intent that it should finally remain there.

6. INTOXICATING LIQUORS ⟹138—TRANSPORTATION INTO PROHIBITION STATE.

Relative to transporting liquor into a prohibition state in violation of Act March 3, 1917, § 5 (Comp. St. 1918, § 8739a), defendant having actually transported whisky in his boat across the state line in Mississippi into Tennessee, and with intent that it should finally remain in that state, it was immaterial that he had incidentally gone out again with his boat and cargo, or that he was outside it when arrested.

7. INTOXICATING LIQUORS ⟹223(2)—VARIANCE—PLACE.

Variance between indictment for transporting liquor into a prohibition state, charging transportation to a certain point therein, and proof that defendant's journey ended two or three miles short of that point, he being arrested on his journey, was immaterial.

In Error to the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

Tom Bishop was convicted of transporting liquor into a prohibition state, and brings error. Affirmed.

A. B. Galloway, of Memphis, Tenn., for plaintiff in error.

Wm. D. Kyser, U. S. Atty., of Memphis, Tenn.

Before KNAPPEN and DENISON, Circuit Judges, and HOLLISTER, District Judge.

DENISON, Circuit Judge. [1, 2] Bishop was convicted of bringing intoxicating liquor from Missouri into Tennessee. Act March 3, 1917, c. 162, § 5, 39 Stat. 1069 (Comp. St. 1918, § 8739a). He was the owner of a tramp gasoline launch plying upon the Mississippi river. At Caruthersville, Mo., he took on a load of whisky and started down stream. There are, on the Tennessee shore 20 or 30 miles above Memphis, two landings, Richardson's and Pleasant View; the latter is 5 or 6 miles below the former. Tennessee officers, stationed upon the river bank about halfway between these two landings, observed Bishop's boat passing. They put out in their boat, discovered the character of his cargo, and brought him and his boat to the shore. He was asked by the officers the destination of the whisky; he said he did not know, and that his helper had the bills of lading. This helper thereupon produced some kind of bills of lading, which gave the name of the consignee and the place of the destination as Lake Providence, La. Each one of the cases was marked with the same consignee and destination. The sufficiency of the evidence, in order to make a case for submission to the jury and upon the theory that the state of Tennessee was, in truth, the final intended destination, depends upon statements made by this helper to the officers in the presence of Bishop, and not denied by him. Bishop had said that they were intending to land at Pleasant View to pick up the owner of the whisky. The helper said that they expected the owner of the whisky to meet them either at Richardson's or Pleasant View with two trucks upon which to unload the whisky; that they had prepared to land at Richardson's, if

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they had received a signal, but, receiving no signal, were going on to Pleasant View. If the owner was to meet them and unload the liquor onto trucks, the inference that it was intended for transportation to Memphis would be practically inevitable; and this testimony of the helper was plainly substantial evidence which, when Bishop failed to question its accuracy, tended to show his participation in transporting into Tennessee for permanent stay in that state; and the claim that there was no evidence to support the verdict is not sustainable, unless for the reason now to be stated.

[3-6] The record is very vague and unsatisfactory as to whether Bishop and his boat had crossed the line into Tennessee before the officers took charge. This question, apparently, was not brought to the attention of the court below in any clear way, if at all; what was said upon the trial seemed to indicate only that respondent depended upon the lack of any landing in Tennessee; and the briefs and arguments in this court indicated that attention had not been given to the question as to the precise location of the state line in the river. However, since it does not appear that Bishop had anything to do with purchasing or ordering the liquor, the conviction cannot be sustained, unless the record fairly indicates that he had crossed the state line while he was still acting voluntarily.

There is nothing to indicate that, at this point in the river, there had been any avulsion such as considered in Arkansas v. Tennessee, 246 U. S. 158, 173, 38 Sup. Ct. 301, 62 L. Ed. 638, L. R. A. 1918D, 258, and it therefore is to be taken as settled that the state line at this point between Missouri and Tennessee, when this boat was seized, was the middle of the navigable channel as it existed at that time. Arkansas v. Tennessee, supra, and cases cited 246 U. S. pp. 169–172, 38 Sup. Ct. 301, 62 L. Ed. 638, L. R. A. 1918D, 258.

The testimony is that the boat was "in midstream." There is also testimony that, at one time, the boat was closely hugging the Tennessee shore; but this seems to refer to a time after the arrest, when the officers were bringing the boat ashore. In view of this fact, and the further statement that the navigable channel was here near the Tennessee shore, this statement about "hugging the shore" is an unsatisfactory basis for any definite conclusion. However, the boat had traveled down the river, constantly opposite Tennessee, for 100 miles or more, and it would be very strange if it had not repeatedly crossed over the center of the navigable channel and entered upon Tennessee territory. The natural effort of this light draft small boat would have been to make as straight a course as possible, and this would have taken it east of the center every time the channel made a bend to the west. We think that the jury would be clearly entitled to infer, merely from the fact of this journey and the common knowledge regarding the nature of the river and its winding channel, that a considerable part of the journey had been made within the limits of Tennessee. When to this we add the fact that they intended to land at Richardson's, if they were signaled, and would naturally have drawn in close to that landing, and the further fact that no denial that this had occurred, nor any claim that Bishop had constantly kept his boat in Ar-

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kansas, seems to have been made at the trial, we think there is no doubt that the evidence in the case, coupled with matters of judicial and common knowledge, fairly supports the conclusion that Bishop had actually transported the liquor across the state line into Tennessee and with the intent that it should finally remain in that state. If this is true, the fact that he had incidentally gone out again with his boat, or even was outside the state at the moment of his arrest, would not be material. Jones v. United States (C. C. A. 6, May 6, 1919) 259 Fed. 104, 170 C. C. A. 172.

[7] The indictment charged transportation "to Pleasant View." The proof showed that Bishop's journey ended two or three miles short of Pleasant View. We cannot think this a material variance.

The conviction is affirmed.

(259 Fed. 198)

CENTRAL VANNINA v. LOPEZ.

(Circuit Court of Appeals, First Circuit. May 26, 1919.)

No. 1380.

LANDLORD AND TENANT ⟹213(1)—RENTAL—PAYMENT—DEPOSIT IN COURT.

The obligation to pay rent at the tenant's domicile, imposed by Civ. Code Porto Rico, § 1139, when the place of payment is not specified in the lease, is subject to the implied condition that the landlord, either in person or by agent, is present to receive payment, and where the landlord or agent is not present to receive payment, the tenant is not obligated to deposit the rental in court, under the provisions of section 1144 et seq.

Appeal from the Supreme Court of Porto Rico.

Unlawful detention action by Teresa Lopez against the Central Vannina. A judgment for defendant was reversed by the Porto Rico Supreme Court, and defendant appeals. Reversed and remanded, with directions.

Jorge V. Dominguez, of San Juan, Porto Rico (Coudert Bros., of New York City, on the brief), for appellant.

Joseph B. Jacobs, of Boston, Mass. (Jacobs & Jacobs, of Boston, Mass., and Luis Munoz Morales, of San Juan, Porto Rico, on the brief), for appellee.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

BINGHAM, Circuit Judge. This is an action of unlawful detainer, brought by Teresa Lopez against the Central Vannina to recover possession of certain rural properties in Porto Rico leased by her to the defendant.

The rental under the lease was originally fixed at $120 per month, but was afterwards, by agreement of parties, reduced. It was reserved in the following terms:

"The canon or rate of rents of this present lease is $120 a month, which the lessee corporation shall pay to lessor, the owner of the properties, at the expiration of each month."

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The place where the payment was to be made was not stated in the lease.

The action was brought August 24, 1916, and the complaint alleged that the defendant had not paid the rent due for the previous month of July. The defendant denied this, and alleged as a special defense that payment had not been in any way demanded from the defendant, either by the plaintiff or any other person, and that neither the plaintiff nor any other person in her behalf had come to the domicile of the defendant with the purpose of demanding payment of the rent for July.

In the district court of San Juan it was found that the rent for July, 1916, had not been paid; that the plaintiff's domicile was Caguas, and the defendant's domicile San Juan; that the plaintiff had no representative residing at San Juan to whom payment of the rentals could be made; and that she had taken no steps for the collection of the rental for the month of July. It was held that the defendant was not in default as to the payment of the rent, and that the action should be dismissed. In discussing the matter the court said:

"In accordance with the contract, the defendant corporation is bound to pay the rentals at the expiration of each month; but this obligation must be complied with in the domicile of the Central Vannina, as prescribed by section 1139 of the Revised Civil Code. The lessee is bound to pay, after the rentals become due; but it is not necessary for it to move out of its domicile, and if the lessor wishes to be faithfully paid, with no inconveniences whatsoever, she must authorize somebody to receive in her name the payment of the rentals due in the domicile of the defendant corporation. While no opportunity be offered to the lessee to make payment, it cannot be said that the latter has breached the conditions agreed upon in the contract as to payment of the monthly rentals due"—citing Revised Civil Code, §§ 1139, 1477.

On appeal to the Supreme Court the decision of the district court was reversed. The Supreme Court, however, agreed with the district court (1) that by the terms of the lease the rent became due at the expiration of each month; (2) that under section 1139 of the Code the place of payment was the domicile of the defendant corporation, the contract not expressly fixing the place at which payment was to be made; and (3) that the district court was right in holding that the defendant lessee was not obliged to go away from its domicile to pay the rent. But it held that, inasmuch as the defendant could have made the payment without moving out of its domicile, even though no one appeared to demand it, by complying with the provisions of section 1144 et seq. of the Civil Code, it should have done so, and was therefore in default; that no demand of payment was necessary.

Section 1472 of the Civil Code provides:

"The lessor may judicially dispossess the lessee for any of the following causes: * * *

"2. Default in payment of the price agreed upon."

No question is raised, and none properly could be, that under the terms of the lease and the provisions of section 1139 of the Code the rent was payable monthly at the domicile of the defendant in

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San Juan at the expiration of each month, and the question is whether, under the circumstances presented in this case, the defendant can be said to be in default, and subject to being dispossessed of the leased property.

As before pointed out, the Supreme Court was of the opinion that the defendant was in default, although the rent was payable at its domicile in San Juan, and the plaintiff did not reside or appear there in person or by agent to receive payment at the time designated; that it was still necessary for the defendant, in order to perform its obligation under the lease and escape a default, to have made a "consignation" by depositing the money in court in accordance with section 1144 et seq. of the Civil Code. The Civil Code provides:

"Sec. 1144. If the creditor to whom the tender of payment has been made should refuse to accept it, without reason, the debtor shall remain released from all liability by the consignation of the thing due.

"The same effect shall be produced by the consignation alone when made in the absence of the creditor, or when the latter should be incapacitated to accept the payment when it is due, and when several persons claim to have a right to collect it, or when the instrument mentioning the obligation has been mislaid.

"Sec. 1145. In order that the consignation of the thing due may release the obligee, notice thereof must previously be given to the persons interested in the fulfillment of the obligation.

"Consignation shall have no effect when not strictly in accordance with the provisions governing payment.

"Sec. 1146. Consignation shall be made by depositing the things due at the disposal of the judicial authority before whom the tender shall be proven in a proper case and the notice of the consignation in other cases.

"After the consignation has been made the persons interested shall also be notified thereof."

If it be assumed that, under the civil law, a demand is not necessary to put the lessee in default, it does not follow that where the rent is payable at a given time and place, and the lessor is neither domiciled at that place nor present in person or by agent to receive payment on the appointed day, a lessee should be held in default and subject to be dispossessed of the leased property. The provision of the Code as to consignation or payment into court is not a part of the obligation of the lease, but is a mode provided by law by which the lessee may not only avoid the payment of interest or costs, should an action be thereafter brought against him for the rent, but also obtain a discharge from the obligation itself, while a tender would only relieve him from costs and interest.

As the rent in this case was payable at a given time and place, namely, on the expiration of each month at the domicile of the lessee, the obligation to make payment at the time and place was subject to the implied condition that the plaintiff, either in person or by agent, would be present to receive payment; and as payment could not be made in accordance with the terms of the lease because of the plaintiff's failure in this respect, the defendant cannot be held to have been in default.

The judgment of the Supreme Court of Porto Rico is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion, with costs to the appellant.

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(259 Fed. 201)

FISH v. PENNSYLVANIA CO.

(Circuit Court of Appeals, Sixth Circuit. June 4, 1919.)

No. 3254.

RAILROADS ⟹350(18)—ACTION FOR INJURY AT CROSSING—CONTRIBUTORY NEGLIGENCE.

In an action for injury to a passenger on an auto truck, struck by a train at a railroad crossing, evidence *held* not to justify direction of a verdict for defendant on the ground of contributory negligence.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Ohio; John M. Killits, Judge.

Action by Edward Fish against the Pennsylvania Company. Judgment for defendant, and plaintiff brings error. Reversed.

Samuel G. Rogers and Luther Day, both of Cleveland, Ohio, for plaintiff in error.

F. H. Waters, of Akron, Ohio, for defendant in error.

Before WARRINGTON and DENISON, Circuit Judges, and WALTER EVANS, District Judge.

DENISON, Circuit Judge. By invitation of the driver, named Keller, plaintiff, Fish, was riding with Keller on the seat of a five-ton automobile truck as it approached a crossing of the Pennsylvania Railroad. Plaintiff's nine year old boy was with him. When the head of the truck was 15 feet from the track, Keller stopped, and he and Fish looked in both directions and listened. Neither seeing nor hearing any approaching train, they started on, but when about halfway to the track the engine stalled. Plaintiff got off, went forward, and cranked the engine, looked up and down the track, and signaled to come ahead, and, as the front of the truck passed where he was standing, stepped into the seat. Before the truck had finished crossing the track, it was struck by a train from the south. Keller was killed, plaintiff badly hurt, and the boy somewhat injured. Fish thereupon brought this action in the court below, and it was twice tried without permanent result. At the close of plaintiff's evidence on the third trial, the court instructed a verdict for defendant, and to review this instruction, Fish brings this writ of error.

It was assumed by the court below, and is conceded by both parties, that the evidence tended to show negligence by the railroad. Taken most strongly for plaintiff, the proof was that the train was running from 60 to 70 miles an hour, and gave no warning of its approach to this crossing. The instruction was based upon plaintiff's contributory negligence.

The truck was going east. Shortly south of the crossing, the railroad, as it comes north, curves to the right. The westerly bow of this curve was occupied by a train standing on a switch track east of the main track, so that one standing upon the highway could see south along the track only as far as this curve, and, as he moved to the east, and approached the track, the closer he came, the shorter his range of view

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down the main track. The instruction given to the jury was based upon a supposed mathematical demonstration that when Fish left his place of comparative safety upon the ground, and stepped upon the moving truck, the train was in plain sight, and the danger to the truck was imminent. This result is reached by computing the extreme distance which the truck could have traveled after Fish mounted it, and before the collision, its rate of speed, and thus the time consumed, the speed of the train, and hence the greatest possible distance which can be attributed to the train at the critical moment. From these comparisons, it is said that the train could not have been over 500 or 600 feet away, and must have been plainly visible.

We are not satisfied that any definite and conclusive computation leading to this result can be based upon this record. There are too many elements of uncertainty, and a minute variation in any one of these elements destroys the demonstration. We first observe that the computations rest upon the inerrancy of the sole witness, the nine year old boy, who testified at this trial two years later. It is right to assume that he was an honest witness, giving his best recollection of everything; but the jury is not bound to accept from such a witness his estimates of time and distance as perfectly accurate, particularly, when the inferences therefrom tend to show that two capable men were guilty of suicidal carelessness. If the distance from the track to where the truck first stopped was 20 or 25 feet, instead of 15 feet, or if Fish walked two or three steps toward the truck before mounting it at the west rail of the track, the computation is upset; and neither of these suppositions would be so substantially variant from what the witness said, or would so impeach his testimony, that the jury might not have adopted one or the other as the most reasonable explanation of the event. The margin is too close to allow for the trifling errors in recollection or mistakes in estimates commonly found in the testimony of even the best witnesses. This situation illustrates the difference between the instant case and our opinion in Hurlburt v. Erie Co., 221 Fed. 911, 137 C. C. A. 481. There, there was a clear vision of the track for a quarter of a mile, and the estimates of the witness as to the speed of the horse and buggy, or the place they began to watch out for the train, could be greatly modified and varied without affecting the result.

We next observe it is assumed that the truck was running not less than 2 miles per hour. There is no testimony fixing the speed, but this rate was thought to be the reasonable minimum; on the contrary, we think it is not uncommonly to be observed that a heavy truck, starting up from a standing position to cross over a railroad track, sometimes moves very slowly—say as slowly as 1 mile an hour—for the first few feet; and if this assumption is permissible, the computation is again upset, for not more than five or six seconds need have intervened between the appearance of the engine around the curve and the collision. Much is made of the statement that the truck "slowed down" to allow plaintiff to mount it; from this it is inferred that the truck was moving rapidly enough to permit the speed to be reduced, but still without stopping. However true this would be of a truck under full headway, it can hardly be accepted as an infallible descrip-

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tion of precisely what happened when the truck was just getting started. When this boy is speaking of an occurrence only 7 feet ahead of where the truck started, the distinction between slowing down and going slowly is not enough to support an instructed verdict.

Still further, it is assumed that after Fish had gone upon the track and signaled to come ahead, and as he stood on or near the track with his back to the south, it was his duty to turn around and look again to the south before he mounted the truck. This might be true as matter of law, if a substantial interval had elapsed after the first look; but, if the time intervening was only two or three seconds, it cannot be imperatively concluded that a reasonably prudent man would have turned around and looked again. Such interval only covers the time necessarily consumed in preparing to mount and mounting the truck.

Again, it is not at all inconsistent with the testimony that the place where the truck stalled and stopped was so close to the rail that it would seem to Keller and Fish to be in danger from a passing train, even though measurements and reflection would have shown the lack of danger. It follows that the attention of both might well have been concentrated on the task of getting the truck across the track, and hence that their duty of looking out for an approaching train cannot be judged by the same strict standard as if there had not appeared to be an emergency.

This history of the case indicates that the questions of fact involved are close, and the inferences necessary to support the right of action may not appeal to all as the probable ones; but we are not convinced that all reasonable men must agree in concluding that Fish did not exercise ordinary care under the circumstances.

The judgment must be reversed, and the case remanded for a new trial.

(259 Fed. 203)

BERRY v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. April 7, 1919.)

No. 3257.

1. INDICTMENT AND INFORMATION ⟹154—WAIVER OF OBJECTIONS—FAILURE TO DEMUR.

   Failure to demur to the indictment waives all objections thereto, except the objection that some substantial element of the crime was omitted therefrom.

2. PERJURY ⟹25(1)—INDICTMENT—MATERIALITY OF STATEMENT—MODE OF PLEADING.

   The materiality of a perjured statement may be alleged in an indictment, either by an allegation of materiality or by pleading facts which show materiality.

3. PERJURY ⟹25(6)—INDICTMENT—MATERIALITY OF STATEMENT—SUFFICIENCY OF ALLEGATION.

   An indictment for perjury, which alleged that defendant made and filed with the register a false affidavit of work done concerning a desert land entry then pending sufficiently alleges the materiality of the false affidavit. under the statute requiring proof of the expenditure of money on improvements.

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4. PERJURY ⟹19(2)—INDICTMENT—SUFFICIENCY—ACTION BY GOVERNMENT.
Under Criminal Code, § 125 (Comp. St. § 10295), imposing a penalty on any one who states under oath material matter which he does not believe to be true, an indictment charging perjury by making a false affidavit of proof of improvements on a desert land claim is not fatally defective for failure to charge that the affidavit was accepted and acted upon by the government.

5. PERJURY ⟹26(½)—INDICTMENT—FALSITY OF STATEMENT.
An indictment charging that defendant made affidavit in support of a desert land claim that a certain sum was expended for clearing and breaking 20 acres of land, which he knew to be false, and that no clearing or breaking had been done upon the tract of land described in the affidavit, sufficiently alleged the falsity of the affidavit.

In Error to the District Court of the United States for the Southern Division of the Southern District of California; Oscar A. Trippet, Judge.

Charles Berry was convicted of perjury, and he brings error. Affirmed.

The plaintiff in error was convicted upon an indictment charging him with perjury in making an affidavit. The indictment alleges that the affidavit was made concerning a desert land entry then pending in the United States land office as the testimony of a witness in making the annual proof of improvements upon certain lands described therein, "and which said affidavit is in the words and figures following, to wit: I, Charles Berry, * * * do solemnly swear * * * there was expended for the ultimate reclamation of said land during the first year after date of entry the sum of $160, as is specifically set forth in the following items, to wit: For first clearing and breaking at $8 per acre for 20 acres in S. W. ¼ of S. W. ¼ of sec. 11, $160, * * * he, the said Charles Berry, then and there well knowing that said affidavit was wholly untrue and false, and that no clearing or breaking whatever has been done upon said tract of land described in said affidavit as aforesaid." The indictment further charges that the affidavit was made as the testimony of a witness in making the yearly proof of improvement upon certain land described therein, and that the affiant stated: "My knowledge in regard to the existence of said improvements was obtained from personal examination, and the values thereof are reasonably stated."

Duke Stone, of Los Angeles, Cal., for plaintiff in error.

Robert O'Connor, U. S. Atty., and W. Fleet Palmer, Sp. Asst. U. S. Atty., both of Los Angeles, Cal.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). The plaintiff in error moved in arrest of judgment in the court below, on the ground that the indictment does not charge facts sufficient to constitute an offense against the laws of the United States. The same objection to the indictment is presented in this court, and it is now argued that facts are not set forth in the indictment to show that the evidence alleged to have been falsely given was material to the issues or the facts, or that the affidavit was received, accepted, or acted upon as the affidavit required by law, and that the indictment is fatally defective, for the reason that the affidavit states that there was expended for reclamation of said land $160 for clearing and breaking, whereas the as-

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signing portion charges the falsity of the affidavit to consist in the fact that no clearing or breaking had been done.

[1-3] By failing to demur to the indictment the plaintiff in error waived all objections thereto, except the objection that some substantial element of the crime was omitted therefrom. Dunbar v. United States, 156 U. S. 185, 192, 15 Sup. Ct. 325, 39 L. Ed. 390; Boren v. United States, 144 Fed. 801, 75 C. C. A. 531; Oesting v. United States, 234 Fed. 304, 148 C. C. A. 206. The materiality of a perjured statement may be made to appear either by an allegation of its materiality (Markham v. United States, 160 U. S. 325, 16 Sup. Ct. 288, 40 L. Ed. 441), or by pleading facts which of themselves show its materiality (2 Bishop, New Crim. Proc. § 921; Ammerman v. United States, 185 Fed. 1, 108 C. C. A. 1). The materiality here appears from the facts pleaded. It is alleged that the affidavit was made and filed with the register "in and concerning a desert land entry then pending in the said United States land office." The statute required proof of the expenditure of money on necessary improvements and proof of the manner in which it was expended, and thereby made such proof material. Markham v. United States, 160 U. S. 319, 320, 16 Sup. Ct. 288, 40 L. Ed. 441; Hendricks v. United States, 223 U. S. 178, 32 Sup. Ct. 313, 56 L. Ed. 394; United States v. Smull, 236 U. S. 405, 35 Sup. Ct. 349, 59 L. Ed. 641.

[4] Nor is the indictment fatally defective, in that it contains no charge that the affidavit was accepted and acted upon by the government. Noah v. United States, 128 Fed. 270, 62 C. C. A. 618; section 125 of the Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1111 [Comp. St. § 10295]) imposes a penalty upon any one who, "having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, * * * that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true."

[5] Nor should the indictment be held defective on the ground that the affidavit on which perjury is predicated falls short of alleging that breaking or clearing was done on the land but states only that a certain sum of money had been expended on the property for clearing and breaking. The clear intendment of the language of the affidavit is that clearing and breaking to the value stated had been done on the land, and the falsity of the affidavit is sufficiently set forth in alleging that no clearing or breaking had been done, and that the plaintiff in error knew that the affidavit was wholly untrue and false.

The judgment is affirmed.

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(259 Fed. 206)

EMERSON v. S. S. KRESGE CO.

(Circuit Court of Appeals, Eighth Circuit. May 13, 1919. Rehearing Denied September 1, 1919.)

No. 5228.

NEGLIGENCE ⟹134(3)—ACTION FOR NEGLIGENCE—SUFFICIENCY OF PROOF.

Evidence that a candy counter in defendant's store was placed near the head of a stairway, and that a bin thereon was filled so high that some pieces spilled on the stairway, upon one of which plaintiff stepped and was injured, *held* insufficient to establish defendant's negligence; there being no evidence that its employés habitually spilled candy, or that they knew of it in this instance.

Amidon, District Judge, dissenting.

In Error to the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Action at law by Mrs. Susie McC. Emerson against the S. S. Kresge Company. Judgment for defendant, and plaintiff brings error. Affirmed.

William R. Gentry, of St. Louis, Mo. (Mark D. Eagleton, Oscar Habenicht, M. F. Watts, and Edwin W. Lee, all of St. Louis, Mo., on the brief), for plaintiff in error.

James A. Waechter, of St. Louis, Mo. (John F. Lee, of St. Louis, Mo., on the brief), for defendant in error.

Before CARLAND and STONE, Circuit Judges, and AMIDON, District Judge.

STONE, Circuit Judge. Suit for personal injuries caused by slipping on stairway in defendant's store. At the close of all the evidence the court directed a verdict for the defendant, on the ground that there was no evidence of negligence on the part of defendant. The sole question is the sufficiency of the testimony to authorize submission of the case.

Defendant conducts a ten-cent store on two floors, connected by a stairway. No complaint is made of the construction or lighting of this stair. The theory of the petition is that while descending the stair plaintiff slipped, because of a piece of candy (jelly bean) which had fallen on the stairs or near the head thereof.

Plaintiff contends that she introduced substantial evidence of negligence, in two or three particulars, to wit, that a candy bin, whereon jelly beans were piled and from which they might fall upon the floor, was placed near the head of the stairs; that the candy thereon was piled higher than the sides of the bin; that not long before plaintiff passed that way down the stairs an employé had spilled jelly beans on the floor near the stairway while pouring them into the bin.

Having in mind the contentions of plaintiff and the rule that the evidence must, in this character of question, be viewed in the light most favorable to her, the evidence bearing upon the accident and its

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cause has been twice carefully and fully read. Thus viewed, it shows that plaintiff slipped while on the stairs near the top, because of a jelly bean upon which she had stepped; that immediately after the accident she noticed part of a mashed jelly bean on her shoe, and three or four other jelly beans on the stairs ahead of her and on the floor; that a counter upon which was a bin containing jelly beans was just at the side of the stair head; that the bin was full of jelly beans, piled higher than the sides of the bin; that not more than a half hour before, and probably somewhat less than that time, an employé had poured a supply of jelly beans into this bin, and had spilled a few on the floor near the stair head. We shall not consider the testimony of defendant in contradiction of the above, but only such as was admitted by or undenied by plaintiff. Such evidence is that the stairway was well constructed, having handrails and corrugated metal treads on the steps, clearly lighted, and swept at half-hour intervals by a porter. It is not negligence to place a candy counter near a stair head. There is no evidence that the candy was habitually piled in the bin on the counter in such a way as to naturally or probably fall over the sides of the bin upon the floor or stairs. There is no evidence that any of defendant's employés knew that any candy had fallen on the floor when it was emptied into the bin a short while before the accident, nor are the circumstances such as to charge defendant with such knowledge.

The judgment is affirmed.

AMIDON, District Judge (dissenting). I am unable to concur in the foregoing opinion. I accept the fair and clear statement of facts therein made. From them I think a case was made for the jury. Defendant owed the plaintiff ordinary care. Whether it performed that duty in permitting the candy stand at the head of the stairs, loaded as it was with candy beans likely to slip therefrom, the danger to customers of the candy falling upon the stairs, the fact that plaintiff's injury seems to have been caused from falling by reason of her stepping upon a candy bean, these facts, in my judgment, made a case for the decision of the jury as to whether defendant performed its duty to plaintiff. It is as much the duty of a merchant to bestow his goods so that they are not likely to cause injury to his patrons as to properly maintain and light his stairs. In this connection I think defendant would be responsible for the negligence of its employés in filling the candy bin so that it would overflow, whether the defendant had notice or not. Filling the bin was within the scope of the employé's duty, so as to make defendant responsible for his negligence.

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(259 Fed. 208)

BERRYMAN v. UNITED STATES. GOLD v. SAME. TUCKER v. SAME.

(Circuit Court of Appeals, Sixth Circuit. June 30, 1919.)

Nos. 3264, 3265, 3277.

1. INTOXICATING LIQUORS ⟹236(1)—TRANSPORTATION—REED AMENDMENT—EVIDENCE—SUFFICIENCY.
In a prosecution for violating the Reed Amendment (Comp. St. 1918, § 8739a), brought against defendants, who claimed that the whisky which they procured in Kentucky and transported into Tennessee was destined for Arkansas, evidence *held* sufficient to sustain a conviction.

2. INTOXICATING LIQUORS ⟹138—TRANSPORTATION—REED AMENDMENT—VIOLATION.
It is not a violation of the Reed Amendment (Comp. St. 1918, § 8739a) to carry intoxicating liquors from a state in which sale was allowed across a state in which sale was prohibited, where the liquor was destined for a third state in which sale was permitted.

3. CRIMINAL LAW ⟹534(1)—CONFESSION—CORROBORATION.
In prosecution for violating the Reed Amendment (Comp. St. 1918, § 8739a), evidence *held* sufficient to corroborate the confession of the defendant that he had brought the liquor from another state.

4. CRIMINAL LAW ⟹535(2)—CONFESSION—CORROBORATION—CORPUS DELICTI.
Defendant's confession that he had transported liquor across the state line *held* sufficiently corroborated by the further evidence.

In Error to the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

Bob Berryman, Sam Gold, and J. B. Tucker were convicted of violating the Reed Amendment, and they severally bring error. Affirmed.

Clarence Friedman and Abe Cohn, both of Memphis, Tenn., for plaintiff in error Berryman.

Clarence Friedman, of Memphis, Tenn., for plaintiff in error Gold.

Ralph Davis, of Memphis, Tenn., for plaintiff in error Tucker.

Wm. D. Kyser, U. S. Atty., of Memphis, Tenn.

Before KNAPPEN and DENISON, Circuit Judges, and HOLLISTER, District Judge.

DENISON, Circuit Judge. The plaintiffs in error in these three cases were convicted of violating the Reed Amendment (Act March 3, 1917, c. 162, 39 Stat. 1069 [Comp. St. 1918, § 8739a])—Berryman and Gold upon a joint indictment. They were arrested (Tucker at one time and place, and Berryman and Gold at another) in the state of Tennessee, some 50 miles northeast of Memphis, and while driving towards Memphis an automobile filled with intoxicating liquor. Our recent decision in Laughter v. United States, 259 Fed. 94, 170 C. C. A. 162, January 17, 1919, covers all the questions involved in all cases, except as to the points now to be mentioned.

[1, 2] Berryman and Gold claim that the evidence did not justify the submission of their case to the jury. Both of them testified on

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the trial that they had procured the liquor in Paducah, Ky., and were bringing it from that place. They lived in Memphis, where they were partners in operating a taxicab line, and they had driven from Memphis to Paducah for the purpose of getting the liquor. Their guilt, under their own statement, is not to be doubted, except for the fact that they also claimed that they had procured it for a man in Helena, Ark., and that, when arrested they were making the through trip from Paducah to Helena for delivery there to him. If this was true, they were not guilty, since the sale of liquor in Arkansas was not prohibited. United States v. Gudger (April 14, 1919) 249 U. S. 373, 39 Sup. Ct. 323, 63 L. Ed. 653. However, the facts brought out on cross-examination threw grave doubt upon the truth of so much of this story as involved the Helena destination, and the jury was under no obligation to believe it. From all the facts, it was an entirely legitimate inference that Memphis was the final destination of the liquor; and the jury may, of course, convict upon legitimate inferences, as well as upon direct testimony.

[3] In Tucker's Case, the additional point mainly urged against the judgment is that there was no sufficient proof of the corpus delicti to corroborate the defendant's confession. The proposition that there must be such corroborating evidence in order to justify a conviction is not questioned by the District Attorney, but he affirms the existence of such evidence. The testimony is that Tucker, at the time of his arrest, admitted that he got the liquor in Paducah and was carrying it to Memphis. It is said that this was the only evidence tending to show one element of the crime charged, viz. transportation across the state line into Tennessee, and that, since the crime was not complete without this interstate transportation, the commission of the crime had not been shown at all, except by this confession. Without going at all into the refinements of the legal rule, there are two answers to this contention, either of which is sufficient: The first is that the rear cushion of the automobile had been taken out, apparently to facilitate the packing of the load which was being carried, and Tucker had in his possession an express receipt therefor, issued at Paducah, indicating that he had been in Paducah and delivered this cushion to an express company for transportation to Memphis. This distinctly tended to show that the journey on which he was then engaged began in Paducah.

[4] The other answer is that the liquor itself was there and was being transported, and its presence, in Tucker's charge, under these circumstances, was strongly corroborative of his statement that he had brought it across the state line. Especially is this true, in view of the fact that he could not have purchased it in Tennessee, nor could any one have delivered it to him in Tennessee, without violating the Tennessee law, and it is a fair presumption, and in Tucker's favor, that he procured it where he could easily do so without violating any state law, rather than where its acquisition must have been surreptitious, difficult of accomplishment and in defiance of the laws of the state. Rivalto v. United States, 259 Fed. 94, 170 C. C. A.

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162 (January 17, 1919), and see Robilio v. United States, 259 Fed. 101, 170 C. C. A. 169 (March 5, 1919). This view also disposes of the contention that it was error to charge that the possession of the liquor gave the confession sufficient corroboration.

The convictions and sentences must be affirmed in all three cases.

(259 Fed. 210)

CRONOPOLOUS v. PENNSYLVANIA CO.

(Circuit Court of Appeals, Sixth Circuit. March 5, 1919.)

No. 3205.

1. RAILROADS ⚷359(1)—INJURY TO PERSON ON TRACK—DUTY TO TRESPASSERS.
   A railroad company is not liable for injury to a trespasser on its tracks, unless its employés knew, or were chargeable with notice, that he was in danger, and nevertheless proceeded wantonly or with reckless indifference.
2. RAILROADS ⚷391(1)—LIABILITY FOR INJURY TO PERSON ON TRACK—TRESPASSER—WANTON ACTS.
   A flying switch of cars, while dangerous, when made in the yards or private right of way of the railroad company, does not indicate wantonness or reckless indifference of employés making it towards a trespasser, of whose presence they are not shown to have had knowledge.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Ohio; D. C. Westenhaver, Judge.

Action at law by Thomas Cronopolous against the Pennsylvania Company. Judgment for defendant, and plaintiff brings error. Affirmed.

In the court below a verdict was instructed in favor of the defendant company in the action which Cronopolous had brought against it to recover his damages for injuries from one of the company's locomotives. Through some injury to a car or a package, potatoes, which were being transported by the railroad company, had been scattered on the ground alongside of, and perhaps between the rails of, one of its tracks along its private right of way in the city of Canton and in the interval between two streets which crossed the right of way at right angles. In the early evening, but after dark, Cronopolous and a companion were engaged in picking up these potatoes. While they were so engaged and were alongside the track, one of defendant's yard engines came up in some switching operation; it was pushing four cars and pulling four. Two men on the engine, presumably the defendant's engineer and fireman, saw and spoke to the two men picking up potatoes. Cronopolous filled the basket and went home with it. He came back after more, and then his companion went home with another basketful, intending to empty it and return. While thus alone, and between or near the rails, and facing west as he was picking up potatoes and progressing in that direction, Cronopolous was struck by freight cars coming from the east making a flying switch, and which approached without light or warning.

Wm. J. Dawley and Francis R. Marvin, both of Cleveland, Ohio, for plaintiff in error.

Thomas M. Kirby, of Cleveland, Ohio, for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

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DENISON, Circuit Judge (after stating the facts as above). [1] It is plain that plaintiff was a trespasser upon the railroad property. He was not merely there without any license or right; he was engaged in appropriating to his own use property in which the railroad had at least a bailee's title. As between himself and the railroad, he was stealing the railroad property. There is no reason why there should be, in his favor, any relaxation of the rule as to injuries to a trespasser, which rule goes at least as far as to hold that the railroad is not liable for such injury unless its employés knew or were chargeable with knowledge that he was in danger, and nevertheless proceeded wantonly or with reckless indifference. Kansas City Co. v. Cook (C. C. A. 6) 66 Fed. 115, 121, 13 C. C. A. 364, 28 L. R. A. 181; Louisville Co. v. McClish (C. C. A. 6) 115 Fed. 268, 273, 53 C. C. A. 60; Felton v. Aubrey (C. C. A. 6) 74 Fed. 350, 356, 20 C. C. A. 436; Louisville Co. v. Womack (C. C. A. 6) 173 Fed. 752, 754, 97 C. C. A. 559; Dickson v. Chattanooga Co. (C. C. A. 6) 237 Fed. 352, 354, 150 C. C. A. 366, L. R. A. 1917C, 464. There is no testimony fairly tending to bring Cronopolous within the protection of this rule. In the first place, there had been a substantial interval after he was seen by the engine crew and before he was hit. In the meantime, he had filled his basket and gone away. If the engine crew had then investigated, they would have found he was not there. No railroad man saw him after the beginning of that second trespass during which he was hurt.

[2] In the next place, it is the merest surmise that the flying switch was being made by the same switching crew, members of which had seen him a while before. The first engine, with its cut of cars, had gone back to the east. The yards were located about a block east, and the cars which hit plaintiff were propelled from that direction and from or from near the yards. Even if we overlooked the fact that the flying switch was presumptively ordered by a yardmaster or by a conductor, and that neither one of these would naturally have been on the first engine, still there is an entire lack of connection between the employés who saw the plaintiff and the employés who later caused the injury. It cannot be thought that notice to the first engine crew of the temporary presence of these trespassers imposed on that crew any duty to give notice to the remainder of the defendant's employés in and about the yards. Thirdly and finally, when the engine crew saw plaintiff, he was in a place of safety. Notice that plaintiff, upon one trip of the engine, had been picking up property along the right of way, but at a safe distance from the tracks, would not be notice that upon the next trip he would be between the tracks or close to the rails. A flying switch is dangerous, and suggests, if it does not import, negligence as against strangers rightfully upon the track; but, where it is used in the yards or private right of way, we are not prepared to say that it indicates wantonness or reckless indifference, as against those of whose presence there is no more notice than here appears.

We are compelled to think that, under the undisputed facts, plaintiff was in a place of danger solely at his own risk, and that there was no evidence justifying recovery.

The judgment is affirmed.

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(259 Fed. 212)

STACY & BRAUN et al. v. PARISH OF NATCHITOCHES.

(Circuit Court of Appeals, Fifth Circuit. June 16, 1919. Rehearing Denied October 7, 1919.)

No. 3363.

COUNTIES ⟹182—ROAD DISTRICTS—SALE OF BONDS—BREACH OF CONTRACT BY BIDDER.

An unconditional bidder for bonds of a road district, who voluntarily made a deposit, to be applied on the purchase if the bid was accepted. and retained by the district as liquidated damages if he refused to take them, *held* not entitled to recover the deposit on such refusal on the unjustified contention that they were invalid.

In Error to the District Court of the United States for the Western District of Louisiana; Rufus E. Foster, Judge.

Action by Stacy & Braun and others against the Parish of Natchitoches. Judgment for defendant, and plaintiffs bring error. Affirmed.

J. M. Foster, F. J. Looney, and W. A. Wilkinson, all of Shreveport, La. (Foster, Looney & Wilkinson, of Shreveport, La., on the brief), for plaintiffs in error.

Phanor Breazeale, of Natchitoches, La. (John F. Stephens, Dist. Atty., of Coushatta, La., and Scarborough & Carver and Breazeale & Breazeale, all of Natchitoches, La., on the brief), for defendants in error.

Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

BATTS, Circuit Judge. June 3, 1916, the police jury of Natchitoches parish, La., ordered an election in road district No. 19 on a proposition to issue $250,000 road bonds. Act No. 199 of 1916, vesting certain powers with reference to road districts in a board of supervisors, was approved July 6, 1916, and became effective July 30th. The election was held August 22d, and the result in favor of the bond issue declared August 24th by the police jury. October 30th the police jury received bids for the bonds. Seven of the eight bids were conditioned upon the effect of the act upon the authority of the police jury. The bid of Stacy & Braun was unconditional (except as to depositories) and contained a paragraph as follows:

"As evidence of our good faith in carrying out this offer, we are inclosing herewith certified check for $3,500, which check shall be immediately returned to us if this bid is not accepted; otherwise, to be retained by you as liquidated damages."

The bid was not the highest, but, on account of its unconditional character, was accepted, and the check was cashed. The bonds were printed in accordance with the wishes of the bidders, but they subsequently declined to take them. Suit was instituted by the bidders to recover the $3,500; the petition alleging that the police jury did not

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have power (1) to receive the returns of the election, tabulate the vote, and proclaim the result, nor (2) to advertise for bids, receive them and issue and sell the bonds.

In the case of Crow v. Board of Supervisors, 141 La. 1017, 76 South. 182, the validity of these bonds is established, and the right of the police jury to receive the returns, tabulate the vote, and proclaim the result of the election declared. The opinion also declares:

"Whether it [police jury] or the board of supervisors was the proper authority, under the circumstances, to direct the issue of the bonds, is immaterial, in view of the fact that such direction was given by both."

The reasons upon which the court bases the right of the police jury to act in any respect after the Act No. 199 of 1916 became effective, would doubtless sustain authority to issue and sell the bonds prior to the organization of the board of supervisors. This board was not organized until January 5, 1917. In the meantime the police jury was actually discharging all the duties which had theretofore been imposed upon it by law. It was the de facto governing authority. The constitutionality of the new act was in question, and, even under its terms, some of the "governing authority" was in the police jury. As the legal governing body of the parish, and as actually in control of the road districts, the police jury was undertaking to sell road bonds of the district. With knowledge of the facts, with knowledge of Act No. 199, and charged with knowledge of the law, plaintiffs distinctly waived all questions as to the authority of the police jury, and deposited with them, as representatives of the district, the fund which they now undertake to recover upon the ground that, because of Act No. 199, the police jury could not represent the district.

The bonds are valid. The district, so far as appears, has never repudiated the authority of the police jury, denied the validity of the contract resulting from the acceptance of plaintiffs' offer, or refused to deliver the bonds upon compliance with the terms of the offer. The board of supervisors was organized January 5, 1917, and there is no allegation or proof that they, at any time, repudiated the contract, refused to carry it out, or placed any obstacle in the way of its consummation. There is a complete absence of anything to indicate that plaintiffs have been, or are, unable to get all for which they contracted. They have voluntarily turned over money to the district and authorized the district to keep it, either as a payment on bonds to be purchased by them, or as liquidated damages, in case, for any reason, they may choose not to take the bonds. There is complete absence of legal or equitable grounds upon which a recovery by plaintiffs could be based.

The judgment is affirmed.

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(259 Fed. 214)

ADAMS v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. April 28, 1919.)

No. 5237.

WITNESSES ⟹52(7)—COMPETENCY—HUSBAND AND WIFE—WITNESS FOR EACH OTHER.

In a criminal prosecution in a federal court against a wife, her husband is not a competent witness in her behalf against the objection of the prosecution.

Stone, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Criminal prosecution by the United States against Cora Adams. Judgment of conviction, and defendant brings error. Affirmed.

J. C. Denton and Frank Lee, both of Muskogee, Okl., for plaintiff in error.

C. W. Miller, Sp. Asst. U. S. Atty., of Muskogee, Okl. (W. P. McGinnis, U. S. Atty., of Muskogee, Okl., on the brief), for the United States.

Before CARLAND and STONE, Circuit Judges, and AMIDON, District Judge.

CARLAND, Circuit Judge. The defendant was convicted and sentenced for carrying on the business of a retail liquor dealer without having paid the special tax provided by law. Three errors are assigned:

1. The introduction in evidence of the Meeks subpœna. This point is not worthy of discussion. The subpœna and return tended to show, if anything, what defendant claimed; that is, that Meeks was a myth.

2. The refusal of the court to allow John Adams to be sworn as a witness in his wife's behalf. This was not error. Johnson v. United States, 221 Fed. 250, 137 C. C. A. 106; Stein v. Bowman, 13 Pet. 209, 10 L. Ed. 129; Bassett v. United States, 137 U. S. 496, 11 Sup. Ct. 165, 34 L. Ed. 762; Hopkins v. Grimshaw, 165 U. S. 342, 17 Sup. Ct. 401, 41 L. Ed. 739.

The amendment of Rev. St. U. S. § 858, by Act June 29, 1906, c. 3608, 34 Stat. 618 (section 1464, U. S. Comp. St.), applies to civil cases only. Hendrix v. United States, 219 U. S. 79–85, 31 Sup. Ct. 193, 55 L. Ed. 102. Counsel for defendant thinks it is time the abovementioned rule of the common law was changed, and cites Rosen v. United States, 245 U. S. 467, 38 Sup. Ct. 148, 62 L. Ed. 406.

The Supreme Court can overrule its own decisions, but until overruled they are binding on us. In Benson v. United States, 146 U. S. 325, 13 Sup. Ct. 60, 36 L. Ed. 991, the prosecution called the wife, and the defendant did not object; held, there was no error. But in Stein v. Bowman, supra, the court decided that the rule that husband

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and wife cannot be a witness for or against the other did not establish a privilege which may be waived by either. We think the record in the present case must be regarded as if the United States objected. When the husband was called, counsel stated that he assumed there would be objection, and the court then ruled without a formal objection by the United States; but the court and counsel treated the matter as if the United States had objected. We think we should do the same. Of course, the wife waived the objection, if it was a privilege that could be waived; but the United States did not. The rule under discussion is founded partly on public policy. 1 Greenleaf on Evidence, § 332.

3. There was no error in refusing to charge as requested in relation to decoy evidence. Rosen v. United States, 161 U. S. 29, 16 Sup. Ct. 434, 480, 40 L. Ed. 606; Grimm v. United States, 156 U. S. 611, 15 Sup. Ct. 470, 39 L. Ed. 550; Montgomery v. United States, 162 U. S. 410, 16 Sup. Ct. 797, 40 L. Ed. 1020; Scott v. United States, 172 U. S. 343, 19 Sup. Ct. 209, 43 L. Ed. 471, 25 L. R. A. 341, note.

Judgment affirmed.

STONE, Circuit Judge. I am compelled to dissent, because I believe error was committed in the exclusion of the husband, who was offered as a witness. The wise public policy, which forbids a husband or wife to testify as to confidential communications, is intended, by preserving such confidences from disclosure, to preserve unshattered the sacredness and integrity of the marriage relation, which is so vital to the stability of our civilization. The thought is that married people should be made safe in their communications to each other by the assurance that neither will be permitted to violate such confidences. It is essentially and solely for the benefit of the parties involved, and serves no further useful purpose.

Where both husband and wife voluntarily waive this confidence and desire the disclosure, not only does the sole basis of the rule, and therefore the rule itself, vanish, but there comes into force the cardinal consideration of presenting to the jury all possible information bearing upon the issues in the case. It may be entirely proper to hold that the preservation of the close marriage relation by strict protection of its confidences is more important than the procurement of conviction by evidence obtained through the rupture of that confidence, so basic in our civilization. I cannot conclude that such a purpose is consummated by closing mouths which both husband and wife wish opened to prove lack of criminality by either. Is the marriage relation or is society benefited by preventing a husband or wife from thus coming to the aid of the other in a time of dire need, and to promote justice?

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(259 Fed. 216)

MAYER et al. v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. January 7, 1919.)

No. 3169.

1. CRIMINAL LAW ⟹742(1)—JURY AS JUDGE OF CREDIBILITY.
The jury is the sole judge of the credibility of witnesses in a prosecution for crime.

2. CRIMINAL LAW ⟹628(7), 683(2)—INDICTMENT AND INFORMATION ⟹121(1)—BILL OF PARTICULARS—TESTIMONY BY WITNESSES NOT NAMED ON INDICTMENT—REBUTTAL—DISCRETION.
In a prosecution for engaging in the retail liquor business without having paid the tax required, refusal of bill of particulars, allowance of testimony for the government of witnesses whose names were not indorsed upon the indictment, and the scope of the opportunity allowing defendants to meet such unexpected proof, *held* matters resting in the discretion of the trial court.

3. CRIMINAL LAW ⟹317, 956(1)—NEW TRIAL—CONSIDERATION OF REFUSAL TO TESTIFY.
The fact that defendants did not see fit to take the stand and deny the charges made against them could not be allowed to raise in the minds of the jury any inference of guilt, but it was a matter proper for the court to consider in passing on a motion for new trial and in deciding whether the refusal to give defendants some delay on account of certain unexpected testimony had been seriously prejudicial to them.

4. INTOXICATING LIQUORS ⟹169—ENGAGEMENT IN BUSINESS WITHOUT PAYMENT OF TAX—INSTRUCTION.
In a prosecution for engaging in the retail liquor business without having paid the required tax, requested charge that, if the jury found a sale of the business by one defendant had been made in good faith, so that he was acting as a clerk only, he should be acquitted, *held* properly denied, since in spite of such a good-faith sale he might have been guilty, through the effect of Penal Code, § 332 (Comp. St. § 10506).

In Error to the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

Sid Mayer and Joe Persica were convicted of engaging in the retail liquor business without having paid tax, and they bring error. Judgment and sentence affirmed.

Frank S. Elgin, of Memphis, Tenn., for plaintiffs in error.
Wm. D. Kyser, U. S. Atty., of Memphis, Tenn.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. [1] The plaintiffs in error were convicted of engaging in the retail liquor business without having paid the tax required by section 16 of the Act of February 8, 1875, c. 36, 18 Stat. 310 (U. S. Comp. St. § 5966). They complain that the evidence did not justify the conviction. Their motion for new trial upon this ground was overruled, and the record makes clear that this court can-

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not interfere. If the testimony offered for the government was true, the defendants were guilty; and the jury is the sole judge of the credibility of witnesses.

[2, 3] Complaint is also made that a bill of particulars was refused, and that witnesses were allowed to testify for the government whose names were not indorsed upon the indictment,[1] and that the respondents were not allowed fair opportunity to meet this unexpected proof. These matters rested in the discretion of the court, and we see no reason to think that the discretion was abused. The fact that defendants did not see fit to take the stand and deny the charges made against them could not be allowed to raise in the minds of the jury any inference of guilt; but it was a matter entirely proper for the court to consider in passing upon a motion for a new trial, and in deciding whether the refusal to give respondents some delay on account of this unexpected testimony had been seriously prejudicial to them.

[4] It is also claimed that one of the respondents had sold out his interest in the business carried on at this place at a time before the first date named in the indictment, and that during the period covered by the indictment he was only a clerk for the purchaser. The court refused a request to charge that, if the jury found this sale of the business had been made in good faith, this respondent should be acquitted. A denial of this request, in the form presented, was right. In spite of such a good-faith sale of the business, the respondent might have been guilty, through the effect of section 332 of the Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1152 [Comp. St. § 10506]). Whether, as a matter of pleading, he had a right to insist that he be specifically charged as an aider or abetter, is a question we need not consider. It apparently did not occur to any one at the trial. Its distinct presentation then and there might possibly have led to respondent's discharge under this indictment, and prosecution under a new one. He may have preferred to take his chances before this jury.

The other objections urged do not require notice.

The judgment and sentence are affirmed.

[1] Only in capital cases is this indorsement mandatory. Rev. St. 1033 (Comp. St. § 1699); United States v. Van Duzee, 140 U. S. 169, 173, 11 Sup. Ct. 758, 35 L. Ed. 399.

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(259 Fed. 218)

BANK OF REIDSVILLE et al. v. BURTON.

In re REIDSVILLE FERTILIZER CO.

(Circuit Court of Appeals, Fourth Circuit. April 28, 1919.)

No. 1694.

1. BANKRUPTCY ⟹351—PARTNERSHIP—CREDITORS OF PARTNERS.
   Where a bankrupt is a partnership, the members or some of the members of which are themselves partnerships, the creditors of such a constituent firm are entitled to have their debts first paid out of its assets before creditors of the bankrupt partnership may participate therein.

2. BANKRUPTCY ⟹309—PARTNERSHIP—CLAIMS PROVABLE AGAINST PARTNERSHIP AND INDIVIDUAL ESTATES.
   A creditor, who holds a note of a bankrupt firm upon which a partner has, as joint maker, surety, or indorser, made himself individually liable, is entitled to prove his claim against both the partnership and individual estate.

Petition to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States for the Western District of North Carolina, at Greensboro, in Bankruptcy; James E. Boyd, Judge.

In the matter of the Reidsville Fertilizer Company, a partnership, bankrupt; W. F. Burton, trustee. Petition by the Bank of Reidsville and others to revise an order of the District Court. Reversed.

W. M. Hendren, of Winston-Salem, N. C., W. R. Dalton, of Reidsville, N. C., and A. B. Kimball, of Greensboro, N. C. (A. J. Burton, of Lawton, Okl., and King & Kimball, of Greensboro, N. C., on the brief), for petitioners.

R. C. Strudwick, of Greensboro, N. C. (P. W. Glidewell, of Reidsville, N. C., and Wm. P. Bynum, of Greensboro, N. C., on the brief), for respondent.

Before PRITCHARD and WOODS, Circuit Judges, and ROSE, District Judge.

ROSE, District Judge. The bankrupt, the Reidsville Fertilizer Company, was a copartnership, the partners in which were two other firms and one individual, trading in a partnership name. At the time of its bankruptcy it had outstanding promissory notes, signed not only by itself, but by the respective firm names of its partners. No attempt appears to have been made to secure the adjudication either of the member firms or of the individuals who composed them, nor strictly speaking were the estates of any of them administered in bankruptcy. In lieu of so doing the trustee brought suits in the state court against the individual members of Williams & Hopkins, one of the firms making up the bankrupt copartnership. The creditors of these individuals and of the firm of which they had been members intervened in the suits. A compromise was finally reached by which the defendants

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paid $7,500, $3,000 of which went to a creditor of one of the defendants in his individual capacity, and the remaining $4,500 was turned over to the trustee in bankruptcy under a stipulation reserving to all of the creditors of various classes the right to set up in the bankruptcy court whatever claims they might have against the fund so brought in.

The persons who hold the notes of the bankrupt upon which appears also the firm name of the copartnership from whose members the $4,500 came say they are entitled to have all of it applied to the payment of such notes, which amount to $10,000 or more, and in their view are obligations of that firm as well as of the bankrupt. The trustee contends that the creditors, having proved the notes against the bankrupt and having in common with its other creditors received a dividend of 20 per cent. thereon, cannot set up special rights in the fund on the theory that they are also creditors of one of the constituent partnerships. The referee, and subsequently the District Court, ruled in favor of the trustee. The creditors holding the notes in question have brought the case here by petition to revise.

[1, 2] Where a bankrupt is a copartnership, the members or some of the members of which are themselves partnerships, the creditors of such a constituent firm are entitled to have their debts first paid out of its assets before the creditors of the bankrupt copartnership may participate therein, precisely as the individual creditors of an ordinary copartnership have the first claim upon his assets. In re Knowlton (D. C.) 196 Fed. 837; 202 Fed. 480, 120 C. C. A. 610. That every creditor who holds a note of a bankrupt firm upon which an individual member has, as joint maker, surety, or indorser, made himself individually liable, is entitled to prove his claim both against the partnership and the individual estate is too well settled for discussion. Fourth National Bank v. Mead, 216 Mass. 521, 104 N. E. 377, 52 L. R. A. (N. S.) 225; In re McCoy, 150 Fed. 106, 80 C. C. A. 60.

It follows the order below must be reversed, and the case remanded, with directions to treat the $4,500 in question as assets of the constituent firm of Williams & Hopkins, and to allow the holders of the notes in question, of which Williams & Hopkins were joint makers, to prove their claims against it. Until they are fully paid there can be no participation therein of those persons who are creditors of the bankrupt estate, but not of Williams & Hopkins.

Reversed.

(259 Fed. 219)

PANAMA ELECTRIC CO. v. MOYERS.

(Circuit Court of Appeals, Fifth Circuit. May 29, 1919.)

No. 3324.

1. EVIDENCE ⟹37—LAWS OF REPUBLIC OF PANAMA—NECESSITY OF PROVING.
In an action for an injury occurring in the republic of Panama, refusal to direct a verdict for defendant on the ground that no evidence was introduced of the law of Panama *held* error.

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2. APPEAL AND ERROR ⟹1060(3)—IMPROPER ARGUMENT OF COUNSEL—DUTY OF COURT.

Argument of counsel for a plaintiff to the jury, made with the approval of the court, commenting on the result of a former trial, the poverty of plaintiff, the wealth of defendant, and other matters which could not properly be shown in the case, *held* prejudicial error.

In Error to the District Court of the Canal Zone; William H. Jackson, Judge.

Action by H. G. Moyers against the Panama Electric Company. Judgment for plaintiff, and defendant brings error. Reversed.

Stevens Ganson, of Panama, R. P., for plaintiff in error.

E. M. Robinson, of Empire, C. Z., Felix E. Porter, of Ancon, C. Z., and Edwin T. Merrick, of New Orleans, La., for defendant in error.

Before PARDEE, WALKER, and BATTS, Circuit Judges.

BATTS, Circuit Judge. [1] Suit was instituted in the District Court of the Canal Zone by defendant in error Moyers against the Panama Electric Company, for injuries to an automobile, resulting from an accident which occurred in the republic of Panama. The defendant asked for an instructed verdict, based upon the fact that no evidence was introduced of the law of the republic of Panama. Failure to give the requested charge was erroneous. Panama Electric Co. v. Moyers, 249 Fed. 19, 161 C. C. A. 79.

[2] Attorney for plaintiff, in the argument to the jury, made use of the following language:

"Gentlemen of the Jury: A former jury has rendered a verdict in favor of this plaintiff for $1,000; the defendant then took advantage of a number of technicalities, and appealed the case to the United States Circuit Court of Appeals in New Orleans, and that court, on a pure technicality, reversed the case, and the plaintiff, who was a poor man, has been forced to expend a large sum of money—in all several hundred dollars—to fight this appeal. The defendant is a rich corporation, with plenty of money, and has attorneys employed by the year, and it, like all other large corporations, resorts to technicalities and subterfuges to keep a man like this plaintiff out of his money, and this company is now preparing to appeal from the verdict that you will render, and it will keep on fighting the case clear to the Supreme Court of the United States, simply because it has plenty of money and the plaintiff has none."

The court stated that this argument was proper, "as it dealt with things that were matters of record in the case." The argument dealt with matters not in the case, and which could not have been properly in the case. It was inherently improper, it was improperly approved by the District Judge, and it was necessarily prejudicial. The failure of the trial judge, upon request of defendant, to instruct the jury to disregard the remarks, was erroneous.

This is the second reversal of a judgment for plaintiff. If the plaintiff has a case entitling him to damages, it is to be regretted that his attorney and the court have not permitted him to have the benefit of a trial in accordance with law.

The judgment is reversed.

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(259 Fed. 221)

LEWIS v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. April 4, 1919.)

No. 3307.

POST OFFICE ⟹35—USE OF MAILS TO DEFRAUD.

One using letters to induce shipments of produce, with the purpose of converting the proceeds, was guilty of a "fraudulent use of the mails," under Rev. St. § 5480, as amended, by the adoption of the Criminal Code, March 4, 1909 (section 215 [Comp. St. § 10385]), although the letters used stated, "You can ship them B. L. attached if you want to, or I will send you check as soon as they come in;" it not being necessary, to render one guilty of such offense, that the letters used disclose a fraud.

In Error to the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Jonathan K. Lewis was convicted of fraudulent use of the mails, and brings error. Affirmed.

Sam A. Montgomery, of New Orleans, La., for plaintiff in error.

Jos. W. Montgomery, U. S. Atty., and Nicholas Callan, Asst. U. S. Atty., both of New Orleans, La., for the United States.

Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

BATTS, Circuit Judge. Plaintiff in error was indicted for "fraudulent use of the mails." The scheme charged involved the use of letters to induce shipments of produce and the purpose to convert the proceeds. The indictment is good. The case relied upon by plaintiff in error (Faulkner v. United States, 157 Fed. 840, 85 C. C. A. 204) holds that the fact that a circular sent out by a commission merchant contained exaggerations, and that he failed to settle with some of his patrons, would not sustain a conviction on an indictment under Revised Statutes, § 5480 (Comp. St. § 10385). With reference to fraudulent intent, the allegations in the instant case are more comprehensive than the proof in the Faulkner Case. Besides, the Faulkner Case was decided prior to the amendment effected by the adoption of the Criminal Code (Act March 4, 1909, c. 321, § 215, 35 Stat. 1130). The cases of Bettman v. U. S., 224 Fed. 819, 140 C. C. A. 265, and Tucker v. U. S., 224 Fed. 833, 140 C. C. A. 279, are conclusive against plaintiff in error's contention.

It is insisted that the letter set forth in the first count negatives the intent to defraud. The letter contains the following with reference to shipment of peas:

"You can ship them B. L. attached, if you want to, or I will send you check as soon as they come in."

If it were necessary that the "writing * * * sent by the post office establishment," as an element of the crime, disclose a fraud, that which would make it illegal would render it innocuous. It was not the purpose of the law to punish merely the incompetent in crime. Efficiency in fraud should not insure immunity. The letter may have

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been well conceived to establish the relations necessary to the success of the scheme charged. Certainly the contrary could not be said, in the absence of a statement of facts.

No error is found, and the judgment is affirmed.

(259 Fed. 222)

STARCH BROS. CO. v. HINMAN et al.

(Circuit Court of Appeals, Seventh Circuit. April 19, 1919.)

No. 2572.

PATENTS ⟹328—VALIDITY AND INFRINGEMENT—COW MILKING APPARATUS.

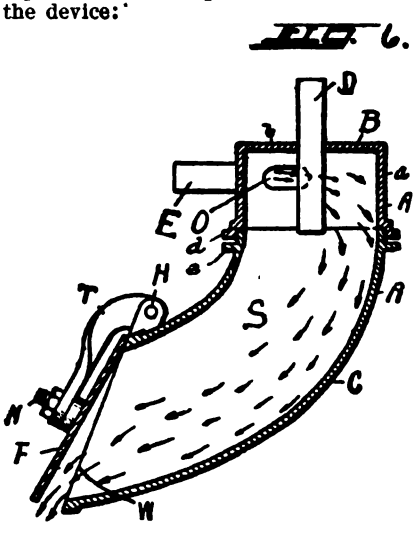
The Hinman reissue patent, No. 13,876 (original No. 1,097,803), for a cow milking apparatus, *held* within the scope of the original patent, not anticipated, valid, and infringed.

Appeal from the District Court of the United States for the Western District of Wisconsin.

Suit by Arthur V. Hinman, Ralph L. Hinman, and the Hinman Milking Machine Company, against the Starch Brothers Company. Decree for complainants, and defendant appeals. Affirmed.

For opinion below, see 247 Fed. 346.

The appeal is from a decree of the District Court finding valid and infringed four claims of appellees' reissue patent No. 13,876 for improvements in cow milking machines. The patent deals with that part of the machine into which the milk is drawn by means of a vacuum formed therein by the exhaust of air therefrom, and out of which the milk flows at atmospheric pressure into a pail or other receptacle therefor. The following figure 6 of the patent shows the device:



S is the body of the device, called by the patentee the "milk chamber." It is separable at *a-e* for convenient insertion through an opening in the top of a pail, then screwing the parts together for the rigid holding of the device while in use, and for ready separation and removal for cleaning. *D* is a tube extending through the top and into the chamber, with upward extending nipple for hose attachment to the means for exhausting air from the milk chamber, and *E* is the milk inlet with outward nipple for hose attachment to the means, usually called "teat cups," for connecting with the teats of the cow. This inlet enters at *O* on a tangent to the circumference of the chamber. *F* is the outlet valve with hinged attachment outside of the chamber at *H* by means of the arm *T*, which loosely holds the metal disk which constitutes the valve. This outlet valve is set at the angle shown in the figure so that it is normally closed by gravity, but in operation the closing is assisted by the suction from the air chamber. The weight of the milk in the chamber causes the outlet valve to open, and as the accumulated milk flows out a sufficient quantity of

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air enters at the opening and before the valve again closes, to release the vacuum in the chamber and the suction on the teat cups produced by the drawing of air and milk through the milk inlet. This helps to produce the pulsating effect or the alternating sucking and release of the teats necessary in the process of milking.

The claims of which infringement is charged are:

"11. In a cow milking apparatus, a milk chamber having a valveless inlet, means for exhausting air from the chamber and a substantially air tight valved outlet closed by gravity and the exhaust of air from said chamber.

"12. In a cow milking apparatus, a milk chamber having a valveless milk inlet, an air exhaust connection, a milk outlet and an outlet valve positioned outside said chamber and closed by gravity and the exhaust of air from said chamber."

"16. In a cow milking apparatus, a milk chamber having a milk inlet in substantially continuous communication with said chamber during the milking operation, a milk outlet and a valve for said outlet, said valve supported by means located entirely outside the milk chamber.

"17. In a cow milking apparatus, a milk chamber having a milk inlet, an air exhaust connection, a milk outlet, a valve for said outlet, said valve supported by means located outside the milk chamber and adapted to discharge milk into a receptacle at substantially normal atmospheric pressure."

Fred Gerlach, of Chicago, Ill., for appellant.
Eugene A. Thompson, for appellees.

Before BAKER and ALSCHULER, Circuit Judges, and LANDIS, District Judge.

ALSCHULER, Circuit Judge (after stating the facts as above). Appellant contends that these claims are for a different invention than is disclosed by, or is within the purview of, patent No. 1,097-803, 1914, of which that here involved is the reissue. We find no merit in this contention. The difference in the four claims is not so much in substance as in the breadth of the claims. They cover the same invention. Claims 12, 16, and 17 are new with the reissue, but claim 11 was one of the original claims, save that in the reissue there is added to it the clause "and the exhaust of air from said chamber," which does not materially change the scope of the claim. Claims 1 and 11 of the original patent sufficiently indicate to us that the patentees there intended and undertook to claim the invention here in issue, and that the more amplified claims of the reissue were fully justified upon the prior disclosure and claims.

The invalidity of the claims is asserted on various prior patent grants. With the possible exception of Peik & Lehman 995,804, June 20, 1911, we find that none of them show the combination of these claims, and are not in the prior art. This was also the conclusion of the District Court and Circuit Court of Appeals of the Second Circuit in passing upon the same question, save that they considered Peik & Lehman in the same category with the other prior art citations. Hinman v. Visible Milker Co. (D. C.) 231 Fed. 174; Id., 153 C. C. A. 24, 239 Fed. 896.

Although the operation of Peik & Lehman is somewhat different, the claims in question are readable thereon, provided its inlet valve having an air hole as in the alleged infringing structure be considered as the equivalent of the valveless inlet. The Peik & Lehman patent

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date being within two years of the Hinmans' application, it was open to Hinmans to show invention prior to Peik & Lehman. This they undertook to do through a device in evidence which they said they made some years before, which showed all the elements of the claims in suit and which they testified worked well. The District Court found that this was a reduction to practice by Hinmans antedating Peik & Lehman. In the New York suit no attempt was made to carry back the Hinmans' invention date.

While we would have much hesitancy in excluding Peik & Lehman as an anticipation of these claims, we are satisfied that under the record here the District Court reached the proper conclusion in finding that Hinmans' invention antedated Peik & Lehman. It is true they did not for a long time proceed with the manufacture of the device they so invented, and made a different article under their first patent. But the evidence established that the device shown was used by them long enough to prove that it was practicable and useful, although they themselves may not at the time have fully appreciated its utility. It does not appear to have been publicly disclosed or abandoned to the public, and the District Court properly concluded it disposed of Peik & Lehman as a prior patent disclosure.

Noninfringement is also strenuously insisted upon. Under the original patent appellees made and sold many of their devices made in accordance with the teachings of the original and reissue patents. Prior to the reissue appellant began to make milking machines in which the chamber part was a literal reproduction of the Hinman device. After the granting of the reissue, upon notice they ceased doing this, and proceeded to make a milking machine, the chamber of which was an upright cylinder closed at the top, through which entered two unobstructed tubes, one for the air exhaust and one for the milk inlet, the outlet at the bottom being closed by a downwardly opening disk valve operated by means of a small arm attached at one end to the under side of the disk, and at about its middle hinged on the lower outward edge of the chamber, holding the disk which thus constituted the outlet valve in normal closed position by means of a counterweight at the outer end of the arm.

Upon further complaint and notice by the Hinmans, appellant discontinued putting out this device, or rather changed it by placing the milk inlet on the side and near the upper edge of the cylindrical chamber, and putting in the discharge end of the inlet a hinged disk valve held normally closed by its own weight, opening into the chamber by means of the pump suction and the weight of the inflowing milk. This contest has to do mainly if not entirely with the structure last described.

A valved inlet would escape claims 11 and 12, one element of which is a valveless inlet, and claim 16 which specifies "a milk inlet in substantially continuous communication with said chamber during the milking operation." It appears, however, that this valve is not a complete valve designed as nearly as possible to be air-tight, but has a hole in it through which the air passes for facilitating the release of the vacuum on the teat side of the inlet, and whereby there is present

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not only the "substantially continuous communication with said chamber" as specified in claim 16, but also substantially the same effect as would result from the entire absence of the valve, as provided in claims 11 and 12. Indeed, it may be said that, to the extent that this so-called valve is designed to permit the passage of air through it when it is closed, it is not a valve at all. But the device clearly falls within the broader scope of claim 17, the elements in the combination of which are, a milk chamber with milk inlet, air exhaust connection, and a valved milk outlet with the valve supported outside the milk chamber, adapted to discharge milk therefrom at normal atmospheric pressure.

The valveless milk inlet to a milk chamber in such a machine is not new with this Hinman patent. Not to mention a number of other prior patents, it is to be found in an earlier patent to Hinmans, No. 907,236, December 22, 1908, of which the reissue patent purports to be an improvement. Indeed, appellees are not contending that the valveless inlet is the invention of the patent in issue, but it is the combination of such inlet with the other elements of the respective claims that constitutes the invention of the claims; and, the other elements being plainly present in appellant's device, they contend with much reason that the hole in appellant's inlet valve is but a colorable evasion of the valveless inlet feature of claims 11 and 12.

We are satisfied that the District Court made proper disposition of the cause, and the decree is affirmed.

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(259 Fed. 226)

HUTCHINS CAR ROOFING CO. v. STANDARD RY. EQUIPMENT CO. et al.

STANDARD RY. EQUIPMENT CO. et al. v. HUTCHINS CAR ROOFING CO.

(Circuit Court of Appeals, Seventh Circuit. March 8, 1919. Rehearing Denied. May 6, 1919.)

Nos. 2556, 2570.

1. PATENTS ⟹328—VALIDITY AND INFRINGEMENT—CAR ROOF.
   The Latta & Thompson patent, No. 1,058,989, for a flexible plate car roof, *held* not anticipated, valid, and infringed.
2. PATENTS ⟹328—INFRINGEMENT—CAR ROOF.
   The Souder patent, No. 763,438, and the Murphy patent, No. 946,823, each for a car roof, *held* not infringed.

Cross-Appeals from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit by the Hutchins Car Roofing Company against the Standard Railway Equipment Company, the Western Steel Car & Foundry Company, the Union Pacific Company, and the P. H. Murphy Company, with cross-bill by the Murphy Company. From the decree, both parties appeal. Reversed on complainant's appeal, and affirmed on cross-appeal.

Cross-appeals from decree dismissing plaintiff's bill seeking an injunction to restrain appellees from infringing patent No. 1,058,989, to Latta & Thompson, and also dismissing cross-bill of P. H. Murphy Company, in which an injunction was sought to restrain appellant from infringing Souder patent, No. 763,438, and Murphy patent, No. 946,823.

Edward Rector and Frank Parker Davis, both of Chicago, Ill., for Hutchins Car Roofing Co.

James A. Carr, of St. Louis, Mo., and Robert H. Parkinson, of Chicago, Ill., for Standard Ry. Equipment Co.

Before BAKER and EVANS, Circuit Judges.

EVANS, Circuit Judge. Plaintiff, as the owner of patent No. 1,058,989, granted to Latta & Thompson, herein called L. & T., sought damages and a restraining order against the defendants, who were either the users, manufacturers, or sale agents of car roofs alleged to infringe complainant's patent. Defendants denied infringement and disputed the validity of the patent. Appellee P. H. Murphy Company, counterclaimed, seeking relief against appellant for alleged violation of the Souder patent, No. 763,438, dated June 28, 1904, and the Murphy patent, No. 946,823, dated January 18, 1910. To this cross-bill appellant filed answer, denying infringement. Appellees also asserted that P. H. Murphy made and sold cars such as disclosed in the appellant's patent more than two years prior to the date of the L. & T. application.

[1] Upon the various issues thus presented the District Judge found—

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"the Latta & Thompson patent valid, and prior in time to Murphy, 946,823 (in suit); plaintiff having carried back the effective date of invention, by proof beyond reasonable doubt, to the time of the disclosure of the pen and ink sketch, April, 1906. Latta & Thompson patent not infringed. Souder patent valid, but not infringed. Murphy patent in suit, No. 946,823, valid, not infringed, and inferior in date to the Latta & Thompson invention."

From this decree both parties appeal; appellees on their cross-appeal attacking particularly that part of the decree which holds the L. & T. patent valid.

In view of the action taken by P. H. Murphy Company in reference to its patent, herein called the Murphy patent, a consideration of the finding of the court on priority first challenges our attention. It is appellant's urge that although the L. & T. application was not filed until May 29, 1907, nine days later than W. P. Murphy made application for his patent, yet nevertheless L. & T. disclosed their combination by a pen and ink sketch as early as April, 1906. In support of the Murphy patent it was claimed that in the fall of 1905 sketches were made disclosing the structure later embodied in L. & T. patent.

The District Judge found in favor of appellant on this issue. Our examination of the evidence does not warrant a disturbance of this finding.

The significance of this finding is appreciated when we examine the file wrapper in respect to the Murphy patent. After L. & T. secured their patent, Murphy made application to the Patent Office to secure a reissue patent covering some of the claims of the L. & T. patent now in issue. The statements there made under oath by Mr. Murphy are significant. They cannot be reconciled with appellees' present position in reference to the state of the prior art.

Mr. Murphy, succeeding his father, was a large manufacturer of car roofs, and thoroughly familiar with the various kinds in use. He had obtained some 50 patents upon car roofs and had experience in contested cases involving questions arising out of prior art citations. He was necessarily familiar with what has been termed the Mexican car roof. After reading the L. & T. patent, he sought a reissue patent to himself, thereby attempting to obtain a monopoly upon certain claims now in dispute. In his affidavit in support of this reissue application he said:

"That, prior to deponent's invention, there were three general types of metal car roofs, namely, inside metal roofs, outside metal roofs, and all metal roofs."

"That deponent is informed and believes that the claims of said Latta & Thompson patent dominate deponent's patent No. 946,823, and the structure therein shown, and thereby deprive deponent and his assignee of the benents that should inure to them by reason of deponent being the true and first inventor of the subject-matter of said claims; and that according to the decision of said Commissioner of Patents in the matter of said Latta & Thompson application, most of the claims of said Latta & Thompson patent were patentable to this deponent, and should have been incorporated in his patent aforesaid."

He also sought to amend his specifications by including, among other things, the following:

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"My plate car roof is as a whole flexible, because the sheets or plates thereof are independently, freely, and movably supported on the carlines or skeleton frame, and are secured thereto as above stated."

Murphy's claim to a reissue patent covering these claims was vigorously pressed before the department. Notwithstanding these statements, appellees now contend that the patent to L. & T. is invalid, because the prior art, and particularly the Mexican Central car roofs, clearly disclosed all that is covered by the claims in suit. It is difficult to appreciate how Murphy can expect the court to give serious heed to the contentions now made that directly contradict his sworn statement when seeking a similar grant from the Patent Office. Prior to any controversy between Murphy and L. & T., the Commissioner of Patents, in granting the patent, said:

"These applicants are admittedly the first ones to provide a designedly flexible all metal car roof."

This finding and observation of the Commissioner of Patents is in perfect harmony with the claim of Mr. Murphy that on May 20, 1907, there were no such car roofs in existence. Entertaining the belief that his application, which was nine days ahead of L. & T., would entitle him to priority over the latter's patent, he under oath set forth the state of the prior art in such a way as to necessarily seriously challenge any reflection now made upon that assertion.

Appellees, having failed to secure this reissue patent, now assert that the prior art was full of patents for car roofs of the type which L. & T. monopolized by their patent. But notwithstanding this inconsistency we have carefully examined the prior art, to ascertain whether the patent to L. & T. was in fact valid. In considering this question, a brief examination of the structure in question will be enlightening. In the specifications of the L. & T. patent we find the following:

"Generally speaking, the invention relates to a car roof possessing adequate flexibility and required roofing rigidity. As components of the structure there are rigid or load-supporting metallic plates, constituting in the main the primary roofing elements, and associated with these plates are suitable means for forming weather-proof joints between the plates, which means are so constructed and arranged that, while the roof will be maintained weather-tight, it will still possess the requisite rigidity and flexibility to permit the weaving actions of the structure."

In other words, we have what in ordinary building parlance might be termed the framework, consisting of the transverse beams or carlines of steel, the longitudinal beams or purlins, the ridge pole or ridge purlin, which skeleton frame, thus composed of carlines and purlins, leave rectangular spaces of considerable area over the top of the car. These are covered by heavy gauge steel plates, there being a series of these on each side, each sheet completely covering the space between the carlines from the ridge to the eaves, and these sheets are in turn flanged downwardly at the eaves and upwardly along the side and at the ridge. Each sheet, excepting the end ones, lies in between two of the carlines, with the side flanges adjacent to the upstanding flanges of these carlines. The eaves flange of the sheet occupies the rabbeted

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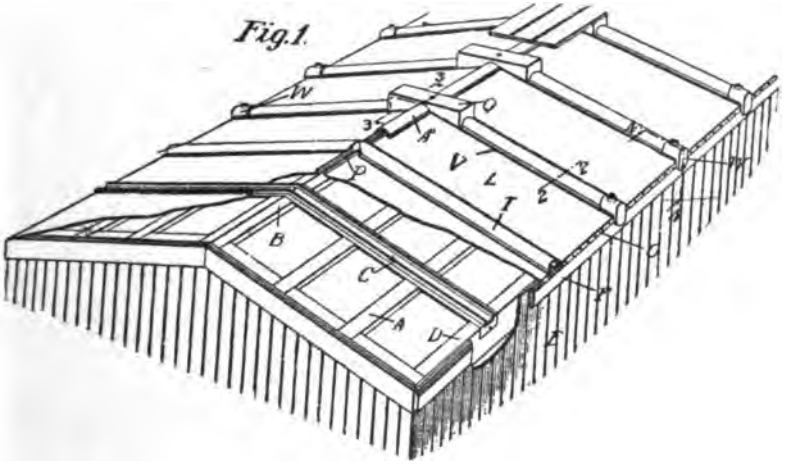
portion of the wooden strip or fascia, which is secured against the side of the car, and this down-turned flange of the sheet may be, and in the preferred form described in the patent is, nailed to the fascia.

The essence of the invention is found in the above-disclosed relationship between the skeleton frame and the sheets or plates, and particularly the relationship between these sheets or plates and the carlines. In addition thereto, and as a part of the carlines in controversy, appellant provided an important element in the combination, being the means for rendering waterproof the joints between the plates or sheets and the carlines. A cap is placed over each joint so as to embrace the flanges of the two adjacent sheets or plates, and the intervening sheets or plates of the foot flange *V* rests upon the sheets. Herewith is submitted a drawing of a car top showing the skeleton made up of the purlins, *A*, the ridge pole or ridge purlin, *B*, the carlines, *C*, the sheets of steel, *L*, the side, *E*, the cap, *T*, with the foot flange *V*. The manner in which the cap, as well as the plates, is attached to the fascia, will be referred to later.



The claims under consideration are:

"1. A flexible plate car roof, comprising a skeleton frame, load sustaining rigid metallic roofing plates spanning open spaces of said frame, and independently freely movably supported thereon and secured thereto, and weather proofing means between adjacent plates permitting said free independent movement.

"2. A flexible plate car roof, comprising carlines, load sustaining rigid metallic roofing plates spanning the open spaces between said carlines and independently freely movable therebetween, and weather-proofing means between adjacent plates, supported thereby independent of the carlines and permitting the independent movement of the plates."

"7. A flexible plate car roof, comprising side plates, metallic carlines connecting the side plates, purlins connecting the carlines, a covering composed of exposed rigid load supporting metal roofing plates adjacent to but spaced from the carlines, caps over the carlines and plate flanges, said caps being spaced from the plate flanges, and lateral foot flanges on the bottom of the caps resting on the plate."

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"13. In a flexible plate car roof, an open frame comprising carlines, exposed rigid load supporting metal roofing plates between the carlines having marginal edge flanges adjacent the carlines and caps over the carlines having side parts spaced from the carlines and plate flanges and having their lower edges arranged adjacent the plates to form a weathering joint therebetween."

In considering the state of the prior art as bearing upon appellant's asserted claim to novelty, it must be admitted that metal roofs as such were old, having been used over wooden roofs, under wooden roofs, and without the support of wooden roofs. The Mexican Central car roofs and the Souder patents well mark the advanced state of the art so far as this patent is concerned. The Mexican Central roof had long been in use, being built in the United States for the Mexican Central Railroad and interchanged with other roads in the United States. Admittedly they were a part of the prior art.

They are distinguishable from the patent in suit, in that they were not "designedly flexible," and there was an absence of weather-proof means found in two of the claims under consideration. It seems their substructure was somewhat like the one under consideration, consisting of a ridge pole, carlines, and purlins. This substructure was covered by corrugated metal roofing sheets extending from eave to eave. The joints between the sheets were formed by merely overlapping the side eaves of the adjacent sheets. At each side of the car there is a strip to clamp the eave ends to the frame. This strip is secured to the side plate by several lag screws extending through the clamping strip and the roofing sheets into the side plate. The sheet was not only fastened securely at the ends, but it was prevented from moving relatively to the substructure by the screws that extended from the clamping strips down through the sheets in the side plates. Flexibility was obtainable only when the holes for the lag screws were torn and much larger than the screws. Likewise, so long as the flanges were in fact waterproof, there was little or no flexibility at this point. Flexibility was obtained here only when the roof was leaky.

The Souder patent related to—

"fireproof or metallic roofs for railway cars or other structures, and had for its object a roof applied without the use of nails or screws and the several parts put together and secured without solder."

Its merits, as set forth in the patent, were:

"The roof thus constructed is without solder being applied to any of its seams or joints and without nails or screws to secure it to the car, and the sections are interchangeable, and any section may be renewed without interfering with its adjacent section."

While doubtless covering a metallic roof, it is evident that rigidity rather than flexibility was sought. The metal sheets were attached at three of the four sides of the parallelogram formed by them, which of course necessarily prevented that relative movement which was the aim and object of L. & T. It is also noticeable that the roof did not call for purlins.

Other citations in the prior art need not be specially considered, for they do not as nearly approach the dignity of an anticipation as either of the two just considered.

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The opposing counsel do not agree upon the meaning of the word "independently," as used in the phrase in claim 1, "and independently freely movably supported thereon and secured thereto," and as used in claim 2 in the phrase "and independently freely movable therebetween" and this difference of opinion leads to a difference in conclusions both as to validity and infringement. Appellees contend that this phrase, fairly construed, describes plates that move independently and freely in relation to each other, while appellant insists that this language describes a structure wherein the plates move freely and independently of the substructure as well as independently of the weather-proofing caps. An examination of the entire patent, the file wrapper disclosures, and the ruling of the Commissioner in allowing applicant's claims, convinces us that appellant's construction of this language is the correct one; that it was appellant's roof as an entirety that was to be "designedly flexible"; that the roofing plates were to be "independently freely movable" in relation to the substructure and the weatherproof caps.

Considering each of claims 1 and 2 as an integer, and giving full effect to each element of the combination, we conclude they are valid. This conclusion on the question of validity is confirmed by the fact that the various types of car roofs in actual use on the cars were shown the District Judge, who examined them all carefully, and thereupon found the claims above quoted to be valid.

Claims 7 and 13 are narrower; a cap to prevent leakage appearing as an added element in the combination. Both claims Murphy sought in his reissue application; claim 13, heretofore quoted, being inserted in the reissue application verbatim, and claim 7 almost verbatim. Both were patentable, according to Murphy, when he was prosecuting his application for the reissue patent. Our examination of the prior art citations fails to disclose a roof that challenges the accuracy of this conclusion. In neither of these claims does the phrase "independently freely movable" exist to vex us. We agree with the District Judge that both these claims are valid.

Infringement. Claims 1 and 2: Appellees' roof does not embody the specific form illustrated in the L. & T. patent. But is it not the equivalent thereof? Broadly speaking, L. & T.'s invention covered a combination that resulted in a roof having a rigid load support, metal roof plates that moved freely in relation to the skeleton frame to which they were attached, so as to permit distortion to which car roofs are necessarily subject, without buckling or other injury to the roof plates. True, the elements as described in the combination, not the results, must measure the limits of the claims. But these elements should also be read with the desired and attained results as a background, rather than be measured by the specific or preferred form described in the specifications. The "preferred structure" or the specific description of the combination found in the specifications, while no doubt instructive in construing claims, is too frequently erroneously assumed to measure the limitations of the patentee's invention.

In the present case the illustrated metal roof plates consisted of two series, one covering but half of the roof, from eaves to ridge. The

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outer ends of the plates of each series are bent down over the eaves and securely attached to the framework; both outer ends thereby becoming rigidly secured to the same common rigid member of the framework of the car. At the inner ends of the roof plates, at the ridge of the roof, there is no attachment. If the plates were secured to the framework at the inner as well as outer edges, they would necessarily respond to any distortions of the framework, and would be quickly distorted and damaged. To attach the plates at the inner edge, leaving the outer edge unattached, would not be such a change as would defeat infringement.

But appellees not only attach the plates at the ridge of the car, but they extend the plate from eave to eave. If attachment of the plates at the ridge of the roof does not avoid infringement, it is not clear how the mere use of a single plate extending from eave to eave, in place of two plates attached at the ridge, would avoid infringement. In fact, the two plates, when commonly attached to the ridge pole, would for all practical purposes constitute but a single plate. Nor would it matter whether the attachment was by a single series of bolts or a double series.

But a still better answer, perhaps, to appellees' claim of noninfringement, due to the difference in place of attachment, or the presence of one instead of a pair of plates, lies in the fact that neither claim specifically calls for two series of plates, nor requires their attachment to the frame at the eaves, instead of the ridge.

Evidence to support the finding that claims 7 and 13 are not infringed is nowhere to be found in the record. That some of appellees' roofs infringe these two claims we think is clear. We find all four claims infringed.

[2] It is unnecessary to consider Murphy's counterclaims. No infringement of either patent appears.

The decree is reversed, with costs, with directions to enter a decree enjoining defendants from further infringing claims 1, 2, 7, and 13 of L. & T. patent, and for damages for past infringements.

As to No. 2570 the decree is affirmed.

(259 Fed. 232)

HUDEPOHL BREWING CO. et al. v. HEHLE.

(Circuit Court of Appeals, Sixth Circuit. May 7, 1919.)

No. 3246.

PATENTS ⟹328—NOVELTY—DISCLOSURE.

The Hehle patent, No. 1,154,989, for "improvements in brewing process," *held* void for want of patentable novelty and for failure to disclose how to practice invention after patent expires.

Appeal from the District Court of the United States for the Western Division of the Southern District of Ohio; Howard C. Hollister, Judge.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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Suit by Boniface Hehle against the Hudepohl Brewing Company and another. From interlocutory decree for injunction and accounting, defendants appeal. Reversed.

Walter F. Murray, of Cincinnati, Ohio, for appellants.
Alfred M. Allen, of Cincinnati, Ohio, for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge. The court below entered the usual interlocutory decree for injunction and accounting in an infringement suit brought against the Hudepohl Brewing Company and another, by Boniface Hehle, upon patent No. 1,154,989, issued to him September 28, 1915, for "improvements in brewing processes."

The technical matters involved may be sufficiently understood without detailed explanation. In the brewing process, the barley (or substituted grain) is first, by germination, converted into malt and dried. The malt is then ground, and the ground product is placed in a vat—the mash tun—and subjected to what is called the mashing process, which may roughly be described as soaking and leaching. The final step of this process is called sparging. In it hot water is sprayed upon the mass from above, percolates down through the then remaining portion of the ground malt, which serves as a filter bed, and carries away in solution some desired elements of the malt. The total product of the mash is a sweet liquor, called wort, and this is the basis of further steps in brewing.

It is the claim of Hehle, both in his patent and in his testimony, that the malt-grinding machines and methods in use before his invention, did not break up the hard ends of the husk, called the "steely" ends, and therefore did not expose to the action of the liquid that portion of the malt contained in these ends, and that such machines and methods did not leave the husk in the best form to serve as a filter bed. He said:

"In carrying out my process, I first grind the grain in such manner that its husks are split longitudinally from end to end, so that the meal contents are free to fall out or be otherwise exposed to enzymatic action and water during the mashing and sparging process. * * * After the husks of the grains have been split lengthwise in the process of grinding, as above described, they are placed in the mash tun, where they constitute a uniform filter-bed through which the sparging liquid uniformly percolates and extracts all the desirable elements from the meal."

He claims:

"1. The process of splitting grains longitudinally, and subjecting the same to the heated sparging liquid."

Hehle also devised a machine for grinding the malt, so as to split the husks longitudinally. He accomplished this by a special arrangement of peculiar corrugations upon the grinding rolls, but he makes no reference whatever in the specification to such machine, or to any means or method of accomplishing this result. It does not appear that any patent was issued upon the machine, but it has gone upon the market

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to a considerable extent, and the evidence strongly tends to show that when the grain is ground in it and then subjected to the mashing and sparging steps, the process is distinctly more efficient than where the malt is ground in some other way. Since the materials involved are consumed on so large a scale, the aggregate saving is very great. There is no room to doubt the utility of the improvement which Hehle accomplished by his machine and process; but that composite utility is of no importance upon the substantial question here involved.

We find some confusion in the arguments as to whether this patent is for a grinding process or for a brewing process. If it were for a grinding process and were in due form, Hehle's contentions, both as to validity and as to infringement, would be very forcible; but we cannot give it that character. Either one of two reasons is sufficient to compel this conclusion. One reason is that the patentee names his invention as an improvement in a brewing process, and, by his claim, calls only for a combination of two steps, which combination is a brewing process. He does not claim any characteristic element in either step. His claim was obviously intended to secure a monopoly upon subjecting to the hot water sparging process grain which had previously been split longitudinally by any method whatever. The other reason is that the specification does not assume to disclose any device or process for splitting the grain longitudinally; it assumes that the person to whom it is addressed will know how to do this; and if the invention and patent were to be considered as for a grinding process, the patent would clearly be void for lack of disclosure.

When we approach the patent from the viewpoint that it is for a process of brewing, we find it to be conceded that there is nothing new in the combination claimed, except the peculiar form of the ground product which was to be treated. Any patentable novelty in this form and in its combination with the other step of the process must rest upon one of three bases: First, novelty in the existence of this form; second, novelty in the peculiar means by which it was produced; third, novelty in the thought that the grain should be put into this form in order to be most useful in this process. We may at once reject the second of these bases, for the reason already stated—that there is no disclosure whatever nor any claim that Hehle had invented any peculiar means of producing this result.

As to the first suggested base, we are not sure that Hehle intends to stand upon it. Confessedly it imports no complete novelty. The form and the adjustment of the grinding rolls, in order to get the product in the best condition for the mash, had been extensively studied and developed by millwrights and brewmasters. It is quite obvious that, in any grinding, by stones or by rolls, there will be a tendency in the grains to present themselves with their shortest diameter across the grinding space, and therefore in part with their length arranged parallel with the grinding surfaces, and that this would often result in splitting the hull lengthwise. This inference is confirmed by examining samples of the product produced by Hehle's machine, and claimed to be that contemplated by the patent, and samples of that produced by the other and older machines and conceded not to

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be the product in question. In the product of the earlier process, a considerable share of the husks is split lengthwise, and in the Hehle product, a considerable share of them is not split lengthwise. The unexpert eye does not easily distinguish between the two. The most that can fairly be said for Hehle in this respect, if we give him the benefit of all doubts, is that, in his machine, there was a deliberate purpose to split the husks lengthwise, which purpose was successful enough to give character to the product, while, in the older devices, such lesser lengthwise splitting as occurred was incidental. This situation leads us naturally to infer that it was not new to grind malt so as to split the hulls lengthwise; and, if there were doubt about this, it would be removed by the facts still to be mentioned.

This leaves for examination only the third suggested base of patentable invention, viz. the thought or conception that the hulls should be split lengthwise in order to get the best result in the mash. For the purposes of this opinion, at least, we may concede that, if Hehle had been the first in this conception, it would not have been necessary for him to teach any way in which the millwright should shape his rolls to get this result, and that the known existence of grain which was partly in this form after grinding, and the possibility of getting it in that form by sufficient pains and expense, would be sufficient to justify naming its employment as one of the steps in the process. However, Hehle was not the first in this conception. In a standard manual of brewing and malting, the Wahl-Henius American Hand-Book, published in 1901, it is said:

"The object of the malt mill is to crush the malt for extraction in the mash tun. The malt should not be crushed too fine, as such treatment will impair the running of the wort. Only smooth rollers should be used for crushing, and the hull should be split open lengthwise and not torn, as will happen if corrugated rollers are used."

Hehle makes no answer to the claim that this text-book discloses an earlier conception of the thought or idea, upon which alone he can stand as the basis of a valid patent, except to say that the Wahl-Henius book proposed to keep the hulls as nearly whole as possible and merely split them open, and that, in truth, corrugated rollers, as used by Hehle, are better than smooth rollers, because the former, properly arranged, will tear the hull into lengthwise shreds, and the hulls in this condition make a better filter bed than if they are merely split open with as little disturbance as possible. It may be true that to split the kernels lengthwise from end to end by corrugated rollers properly arranged leaves both meal and hulls in better condition for the mash than if the grains are split open lengthwise by smooth rollers; but the patent says nothing about all this. The idea that the grain ought to be split open lengthwise was fully disclosed by Wahl-Henius, and Hehle discloses nothing more. If common knowledge of how to do it is to be assumed, in order to make Hehle's disclosure sufficient, it will have the same effect upon Wahl-Henius.

It results that there was no patentable novelty in the process described by Hehle; if he made a valuable invention, as perhaps he did, he did not perform his part of the bargain which supports the issue

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of a patent; he has not told the public how to practice the invention after the patent expires. Mowry v. Whitney, 81 U. S. (14 Wall.) 620, 644, 20 L. Ed. 860.

The decree must be reversed, and the bill of complaint dismissed.

(259 Fed. 236)

D'ARCY SPRING CO. et al. v. MARSHALL VENTILATED MATTRESS CO.

(Circuit Court of Appeals, Sixth Circuit. January 7, 1919.)

No. 3192.

1. PATENTS ⟹328—CONSTRUCTION—VALIDITY.
   The Marshall patent, No. 685,160, for a mattress comprising a cover and a plurality of transversely extending strips of material stitched at intervals to form pockets, etc., and spiral springs arranged in such pockets, *held* valid, showing invention.
2. PATENTS ⟹185—DESCRIPTION—SUFFICIENCY.
   Though the patentee did not anticipate the use to which the patented article could be and was put, he is entitled to protection for such use, where the adaptability was inherent in the structure shown and described in claims and specifications.
3. PATENTS ⟹178—CLAIMS—LIMITATION.
   Where a claim defines an element in terms of its form, material, location, or function, thereby apparently creating an express limitation, and the limitation pertains to the inventive step, rather than to its environment, and imports a substantial function which the patentee considered of importance, forms excluded cannot be considered covered by the patent, under the doctrine of equivalency.
4. PATENTS ⟹328—INSTRUCTION—LIMITATIONS.
   The Marshall patent, No. 685,160, for a mattress, comprising a cover and a plurality of transversly extending strips of material stitched at intervals to form pockets, the pocket of one strip alternating with those of adjacent strip, and spiral springs arranged in such pockets, *held* limited therein to that form of arrangement, and not to be infringed by a mattress similarly constructed, where the pockets were arranged with centers equidistant in right-angled directions, so that there was no nesting of the springs.
5. PATENTS ⟹287—INFRINGEMENT—DAMAGES.
   The president and general manager of a corporation which infringed a patent is not individually liable for damages and profits on infringement, unless he inflicted the damages or received the profits otherwise than through the usual relations between officer and corporation.
6. PATENTS ⟹290—INFRINGEMENT SUIT—DEFENDANT.
   In a suit against a corporation for infringement of patent, the president and general manager, in active control of the corporate affairs, may be made defendant, so that he may be personally bound and enjoined.

Appeal from the District Court of the United States for the Southern Division of the Western District of Michigan; Clarence W. Sessions, Judge.

Suit by the Marshall Ventilated Mattress Company against the D'Arcy Spring Company and others. From a decree for complainant, defendants appeal. Decree reversed, in order that new decree may be entered, modified according to the opinion.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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Otis A. Earl, of Kalamazoo, Mich., for appellants.
Taylor E. Brown, of Chicago, Ill., for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge. Patent No. 685,160 was issued October 22, 1901, to Marshall, and became the property of appellee, who was plaintiff below. It disclosed a mattress or other cushion having a suitable cover, and the resilient body of which was composed of a mass of vertical spiral springs; each spring being contained in a cylindrical pocket of fabric closed at the top and bottom, and several of the pockets being fastened together at their sides, so that they constituted a strip or row of pockets. This was accomplished by taking two strips of fabric of suitable width and imposing one upon the other, or by folding longitudinally upon itself a strip twice as wide, and then stitching transversely at intervals across this double strip. Thus a row of pockets was created, and, after the springs were inserted therein, the ends were closed by whatever further stitching might be necessary. The single claim is:

"A mattress comprising a cover and a plurality of transversely extending strips of textile material arranged therein and stitched at intervals to form pockets having closed ends, the pockets of one strip alternating with those of the adjacent strip, and spiral springs arranged in said pockets, substantially as described."

The court below found validity and infringement, and the defendants bring this appeal.

[1, 2] We agree with the court below that the patent involves invention and should be sustained. A strip of fabric, thus transformed into a unitary series of pockets containing springs, was new, and it has proved to have large commercial utility. Perhaps this utility and extensive use have developed from a method of business not described in the patent or anticipated by the patentee, viz. selling the prepared spring-containing strip as raw material suitable to be made up into a mattress or cushion; but this adaptability was inherent in the structure shown and described, and the patentee's lack of complete prevision is not important. Goshen Co. v. Bissell Co. (C. C. A. 6) 72 Fed. 67, 74, 19 C. C. A. 13.

[3, 4] We cannot give to the presence in the claim of the element, "a cover," the limiting effect which defendants attribute to it. The mattress cover shown in the drawing represented only the familiar environment or field provided for the operation of the mass of covered springs which represented the substance of the invention; and any of the varieties of cover found in the defendants' structures (when finished as intended) must be considered within the inventor's meaning, when he referred to a "cover."

The difficult question is presented by the clause of the claim which reads, "the pockets of one strip alternating with those of the adjacent strip." Obviously, there are two ways in which these rows or strips of pockets may be assembled in order to make a quasi unitary support for a cushion top: They may be put together aligned, with pocket

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centers equidistant in both right-angled directions, or the second row may be moved longitudinally one-half the width of a pocket, and then each pocket will enter partially between two pockets of the first row. In the former case, the rows are wholly distinct from each other and are spaced in both directions the extreme width of the pocket; in the latter case, the pockets of one strip alternate with those of the adjacent strip and the strips have broken joints, or it may be said that the pockets are staggered and nested. The question is whether the finding of infringement should be confined to those structures which have the pockets thus staggered (defendants' first form), or whether those which have the pockets of the first class described (defendants' second form) are so fully the equivalent of the staggered style that they cannot escape. The trial court adopted the latter view.

The rule that an express limitation may not be disregarded and the rule that a form equivalent to a specified form also infringes often seem to come into conflict. There is no fixed formula by which this conflict can be settled, but it must be determined by finding the true meaning of "equivalency" in the case to be decided. In a very fair sense and as to most of the functions involved, it is immaterial whether strips of pockets are arranged in alternate or opposite mutual relation. Considering the scope of the actual invention and of claims which might well have been formulated, there would be little difficulty in finding in defendants' second form the necessary equivalency upon which to predicate infringement, if it were not for the expressly stated requirement about the relative positions of the strips. We assume, as hereafter stated, that this requirement was not inserted under such circumstances as to estop the patentee from asserting his present theory. It follows that the case is to be treated as one of voluntary and unnecessary limitation.

It seems worth while to review briefly some of the controlling or leading cases upon each side of the subject and upon which the parties, respectively, rely. In Winans v. Denmead, 15 How. 341, 14 L. Ed. 717, a claim to the frustrum of a cone was held to include as an equivalent the frustrum of an octagonal pyramid. It is doubtful whether there was so much discrepancy between the letter of the claim and the defendant's form as has been thought, since a cone is a pyramid with an infinite number of sides, or, as recited in the opinion, "a polygon of many sides would be equivalent to a circle"; but, passing by this feature of identity, it is clear that the difference was merely in form, and that, in operation and functions and effect, the two were identical. The difference in form did not stand for anything else, and a rule of equivalency so strict as to exclude from the monopoly one form and include the other would tend to raise doubt as to the existence of any patentable invention.

In Metallic Co. v. Brown (C. C. A. 8) 104 Fed. 345, 352, 43 C. C. A. 568, the claim called for an element located at the side of the horizontal roasting chamber, but the rule of equivalency served to bring within this claim a structure in which this element was underneath the chamber. Here, also, it may be noted that there was not even a literal inconsistency, since the word "side" is often applied to the top

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and bottom sides as well as to the horizontal sides; but again there was no function whatever indicated by the location at the horizontal side as distinguished from the location underneath. There was no room to suppose that the inventor could have thought that the location he specified was material to his invention and thus no room to say that he intended to make it material. The conclusion was not to be escaped that the inventor used the term only because it was appropriate for the specific form which happened to be before him.

In Bundy Co. v. Detroit Co., 94 Fed. 524, 538, 36 C. C. A. 375, this court disregarded the superficial distinction between a key which is rotated and one which is pushed longitudinally. Here, again, there was nothing whatever new in the form or motion of the key; the inventor's forward step pertained to another feature of the mechanism and was to be operated equally well by either form of key. It was in effect held that the specific form of claim reference to an element which was not an inherent part of the new step, but only pertained to a working field therefor, would not be permitted to dominate except in the plainest case.

In Schieble Co. v. Clark (C. C. A. 6) 217 Fed. 760, 133 C. C. A. 490, the claim called for a driving shaft in combination with two pairs of running wheels, and the defendant brought the driving shaft into direct relation with one pair of running wheels only; but he had had the other two running wheels upon his structure, and all their functions with relation to the driving shaft were performed by a pair of supplementary and otherwise unnecessary rollers. The case does not go as far as some of the others do in disregarding distinctions plausibly claimed.

In Keystone Co. v. Phœnix Co., 95 U. S. 274, 24 L. Ed. 344, the claim called for "wide and thin drilled eyebars * * * applied on edge." Defendant used round bars, flattened at the ends where eyes were drilled, and (apparently) placed on edge. Though the two forms were equivalent enough in a general way, yet since it appeared that the "wide and thin" form had thereby additional utility, the claim was limited to the form specified.

In White v. Dunbar, 119 U. S. 47, 7 Sup. Ct. 72, 30 L. Ed. 303, the claim specified a lining of textile fabric; defendant used a lining of paper. The main object of the invention was accomplished just as well by the paper as by the cloth; but the court, in its often-cited "nose of wax" opinion, held that they were not equivalents. The principle seems to be that since cloth and paper are not always equivalent and since cloth has distinctive qualities which the patentee might have considered important, he would not be allowed to escape his express declaration that he claimed cloth only. This court has often applied the same rule.

A recent instance is found in Arnold-Creager Co. v. Barkwill Co., 246 Fed. 441, 158 C. C. A. 505. Here the claim provided that certain elements should be located on the end of the material reservoir, while defendant located them upon the side. This court considered the change sufficient to escape infringement, even though, in a broad sense, there was equivalency. We thought that, by his specification,

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the inventor had indicated his intent that the elements should be upon the end and his belief that there was substantial and material advantage in having them so located; and we observed that to transfer these elements to the side would require considerable reorganization of the machine and would entirely do away with certain simplicities of construction and directness of action which the inventor had believed important. Under those circumstances, we thought we could not disregard the distinction which the patentee had adopted.

Two of our decisions are urged upon us—one by each party—as controlling; but we do not so regard either, when applied to a case of voluntary limitation. Vanmannen v. Leonard, 248 Fed. 939, 941, 161 C. C. A. 57, was a case of estoppel by proceedings in the Patent Office. Whether the patentee would have been held so closely to his specified form if his selection had been voluntary and casual, rather than as evidencing the ground upon which he distinguished the reference and secured his patent, need not be considered. The Vrooman-Penhollow Case, 179 Fed. 296, 102 C. C. A. 484, is also rightly to be thought of as presenting the question of estoppel. The patent issued with a requirement that one named roller should be of "much smaller diameter" than another named roller, and the defendant had the two of the same size. This requirement was inserted after a certain reference had been made, but the court thought it did not in fact serve to distinguish from the reference, and that since it could not have been plausibly thought to import differentiation and since the reference was amply distinguished otherwise, and the difference in size had no function whatever, the patentee could not be charged with having represented the relative size of the rollers to be a patentable difference. It was therefore held that there was no estoppel to prevent the patentee from afterwards claiming that the two forms were equivalent. If it had appeared to the court that the "smaller diameter" was—or that the inventor probably thought it was—important to the full accomplishment of his theory of the machine, there would have been a different case presented.

From a review of these and other familiar cases, we think it is safe to deduce the proposition that where the claim defines an element in terms of its form, material, location or function, thereby apparently creating an express limitation, where that limitation pertains to the inventive step rather than to its mere environment, and where it imports a substantial function which the patentee considered of importance to his invention, the court cannot be permitted to say that other forms, which the inventor thus declared not equivalent to what he claimed as his invention, are nevertheless to be treated as equivalent, even though the court may conclude that his actual invention was of a scope which would have permitted the broader equivalency. Applying this rule, we find that placing the transverse rows of pockets in this alternate nested relation requires the rows to be set about one-fourth closer together than if aligned, and therefore increases the cost of filling the required cushion surface. Certainly this disadvantage would not have been specified, unless it was important. Its distinct utility lies in the fact that a large part of the space which would otherwise

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be unoccupied between the upper coils of the springs is filled with similar springs, so that the supporting surface becomes considerably more unitary and the effect is correspondingly smoother and more uniform, and in the further fact that when the springs are thus placed in much closer contact, the pocket is more especially useful in preventing intermeshing of the springs, and in the further fact that when thus placed the spring-containing pockets mutually support each other in their upright position in distinctly greater decree than if they did not have the close-fitting alternate relationship.

We think the conclusion must follow that the expressly stated limitation cannot be overcome by applying the rule of equivalency, and that the patentee intended and understood his monopoly to be confined to a structure in which the springs had the alternate relationship which he specified. We are confirmed in this conclusion as to his intent by what occurred in the Patent Office. He urged upon the Examiner the presence of this limitation as a reason for distinguishing from a reference, the Examiner replied that the distinction did not import patentable novelty, and the subject-matter was thereafter dropped from discussion, yet the limitation was retained until the end; and Marshall, therefore, after the subject had come to his attention, declared his belief that the distinction was important. Though there may not be much real difference between relying upon an existing claim detail to avoid a reference and inserting a new detail for the same purpose, yet it is the latter action which creates the ordinary estoppel, and we assume, without deciding, that the record does not show that technical estoppel which often has been developed in this class of cases.

Plaintiff urges that this limitation pertains not to a mechanical element but only to a matter of location, and, hence, that a more liberal rule of equivalency should be applied. We cannot see that it is doctrinally important whether the element said to be missing in defendants' structure is a mechanical element or any other kind of an element. The matter of location or mutual arrangement may be less often vital than the matter of presence of a mechanical part, but this will be because of the peculiar facts of the case and not because of any general rule. Plaintiff also urges that the claim is sufficiently met if the pockets are capable of alternation, even though not so assembled, and says that the pockets which are aligned in defendants' cushion (second form), as marketed, will, with use, fall into nested position. If this result happens, it is incidental and accidental. Owing to the difference in top area occupied by the springs in the two methods, it is evident that any partial shifting from the aligned to the nested position injures the cushion. This cannot be intended. Marshall's thought that the cushion cover needed that more perfect support given by the nested, as compared with the aligned, form is further shown by his later patent, issued on a copending application, in which he showed and claimed the aligned form, provided with supplementary smaller springs, arranged to fill the openings between the larger ones.

The second form must be held to be noninfringing.

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[5, 6] The individual defendant, D'Arcy, the president and general manager of the corporation, was held personally liable for accounting as well as for injunction. This is complained of here, although it is is not entirely clear that the point was ever brought to the attention of the district judge. It is the rule in this circuit that such individual liability for damages and profits on infringement does not exist unless the officer inflicted the damages or received the profits otherwise than through the usual relations between officer and corporation. McSherry Co. v. Dowagiac Co., 160 Fed. 948, 965, 89 C. C. A. 26. There is neither allegation nor proof of any extraordinary relation in this respect, and the accounting for profits and damages should not have been ordered against D'Arcy. As to the propriety of making such a managing and directing officer as D'Arcy was a defendant in order that he may be personally bound and enjoined, we have already expressed our approval of the view in the First circuit, rather than that in the Seventh. National Co. v. Leland (C. C. A. 1) 94 Fed. 502, 507, 511, 37 C. C. A. 372; Cazier v. Mackie Co. (C. C. A. 7) 138 Fed. 654, 71 C. C. A. 104; Proudfit Co. v. Kalamazoo Co. (C. C. A. 6) 230 Fed. 120, 140, 144 C. C. A. 418. For this purpose and to this extent we consider D'Arcy an "active participant," within the exception specified in Western Co. v. Northern Co. (C. C. A. 6) 135 Fed. 80, 89, 67 C. C. A. 553. If so, he is liable for the costs of the defense which he actively directed. The exemption from costs which we sanctioned in Ohmer Co. v. Ohmer, 238 Fed. 182, 194, 151 C. C. A. 258, had reference to the costs of this court on appeal.

An injunction is now immaterial, the patent having expired. The decree should be modified, by excepting therefrom articles like Plaintiff's Exhibit 17 and by denying D'Arcy's liability to account; in other respects, it should be affirmed.

We do not undertake to consider the extent of damages involved in a cushion in which part of the strips were in alternate relation and part were not. That question has not been argued and cannot be considered as arising on this record.

The decree below is reversed, in order that a new decree may be entered, modified according to this opinion. Appellants will recover costs.

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(259 Fed. 243)

SOUTHERN TEXTILE MACHINERY CO. v. FAY STOCKING CO.

(Circuit Court of Appeals, Sixth Circuit. January 7, 1919.)

No. 3189.

1. PATENTS ⟹328—INFRINGEMENT—MACHINE FOR UNITING KNIT FABRICS.
The Davis patent, No. 1,050,432, for a machine for uniting knit fabrics claims 1, 7, and 10, *held* not infringed by a particular style of machine used by defendant.

2. PATENTS ⟹328—INFRINGEMENT—MACHINE FOR UNITING KNIT FABRICS.
The Davis patent No. 1,050,432, for a machine for uniting knit fabrics, claims 1, 7, and 10, *held* not infringed by a particular style of machine used by defendant when equipped with a straight needle, but infringed if such machine was equipped with a Davis needle.

3. PATENTS ⟹324(6)—INFRINGEMENT—DEFECT IN PROOF—DISMISSAL OF BILL—DETERMINATION OF APPEAL.
Bill for infringement of patent should not have been dismissed for the easily remediable defect in the proof as to whether or not defendant company did or did not use certain infringing needles, but decree will not be directed for plaintiff; rather the subject should be followed up, on motion of the court, if necessary, far enough to develop the facts.

4. PATENTS ⟹328—VALIDITY—MACHINE FOR UNITING KNIT FABRICS.
The Davis patent, No. 1,050,432, for a machine for uniting knit fabrics, claims 1, 7, and 10, *held* valid.

5. PATENTS ⟹318(4)—PATENTED IMPROVEMENT—PROFITS RECOVERABLE.
Where the patented improvement in a machine for uniting knit fabrics has directly to do only with the shape of the needle, the patentee, suing for infringement, cannot recover the profits of using the entire machine, other parts of which have been properly, though unnecessarily, put into claim combination with the needle, but must be confined to profits resulting from the use of the improved, as compared with an unimproved, needle.

6. PATENTS ⟹322—SUIT FOR INFRINGEMENT—RECOVERY OF PROFITS.
In suit for infringement of patent, before any accounting is ordered for profits, as distinguished from such damages as might be shown by any of the accepted measures, the trial court should be satisfied there is some theory of recovering profits plausible enough to justify an effort to establish it.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Ohio; D. C. Westenhaver, Judge.

Suit in equity by the Southern Textile Machinery Company against the Fay Stocking Company. From a decree dismissing the bill, plaintiff appeals. Reversed, and case remanded.

See, also, 243 Fed. 917.

Obed C. Billman, of Cleveland, Ohio, for appellant.

Hull, Smith, Brock & West, of Cleveland, Ohio, and A. V. Groupe and Cyrus N. Anderson, both of Philadelphia, Pa., for appellee.

Before WARRINGTON and DENISON, Circuit Judges, and KILLITS, District Judge.

DENISON, Circuit Judge. The appellant, as owner of patent No. 1,050,432, issued January 14, 1913, to Davis, for a machine for uniting knit fabrics brought suit against the appellee for infringement.

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The court below dismissed the bill, on the theory that, so far as the claims were valid, they were not infringed.

[1] The defendant was using, in its factory, two styles of machines: One, the Hepworth; the other, the Beattie. On plaintiff's theory of construction of the patent, all the claims sued upon were infringed by Beattie, and part of them by Hepworth. As to the alleged infringement by Hepworth, we agree substantially with the reasoning, and wholly with the conclusions, of the District Judge. Claim 11, in order to be distinguished from the other claims must be treated as directed broadly to the setting of the chaining needle in parallel relation to the impaling pins, instead of at a slight angle thereto. When this change is made with a straight needle, as is done by Hepworth—assuming that there is parallelism, instead of inclination—we see no room for invention; indeed, if the straight needle were set close enough to the pins to get the benefits of parallelism claimed for Davis, the device probably would not operate. If the needle were bent toward the point, to get parallelism near the point in spite of inclination elsewhere, we would then have essentially the "offset" of the other claims.

As to infringement of claims 7 and 10, set up against Hepworth, appellant's chief criticism of the opinion below is that it construed the "offset" of the claim as calling for a bend or shoulder near the point of the needle, and that this was erroneous, because in the interference proceedings the Patent Office tribunals had construed "offset" as referring to the projection of the needle itself from its carrying bracket or shank, and therefore the same meaning must now be given to the word. Appellant is partly right and partly wrong. It was decided that the term "offset," as found in Davis' original claims, included this type of shank or bracket shoulder, and, since this type was old, it was held that Davis could not make the claim, and the interference was dissolved. Thereupon the claims were modified, so as to refer only to the specific type of offset or shoulder shown and described, which was located near the point. In this way, Davis became estopped now to claim that broader meaning for "offset" which he then abandoned. If it might be that a new claim, formulated after the interference, was capable, on its face, of the broader construction, the consideration just stated would make this result impossible.

This consideration does not reach claim 1, which had a different history; but we are not satisfied that the "offset depressed tapered portion" of this claim is not the same thing as the "offset pointed free end" of claim 7, or as the "tapered offset portion" of claim 10; nor does the Hepworth stitch-carrying guide arm have the "yielding" function and operation which characterize this claim. To interpret "yielding" liberally enough to reach Hepworth would make it reach, also, the earlier art.

[2] The Beattie machine was so constructed that it would carry either a straight and inclined needle, like the old art, or a parallel and offset needle, like Davis. We see no reason to doubt—and it must be conceded—that, if the Beattie machine were equipped with the Davis needle, it would be an infringement of claims 1, 7, and 10 of the pat-

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ent. It is equally clear that, if equipped with a straight needle, the Beattie machine would not infringe, for the same reasons that the Hepworth does not. The Beattie machines used by defendant at the time of the trial, and one of which was produced as an exhibit, and the Beattie machines used in another factory, and with which alone the witness Vine was familiar, used the straight needles only. Appellant's president visited the defendant's factory just before the filing of the bill, and testifies that the Beattie machines he there saw were using a "humped" needle. He further testifies that he asked a dealer in this class of supplies to order for him from the manufacturers of the Beattie machine a needle such as they were furnishing the users of their machines, and he produces and identifies the needle which he received from the dealer as having been furnished to the dealer by the Beattie Company in response to the order which the witness had caused to be sent in. The exhibit so produced was essentially the Davis needle, and its use would complete an infringing combination. We cannot think that the state of the proof in this respect justifies dismissing the bill for lack of evidence of infringement. Appellant's witness failed to say, in so many words, that the exhibit produced by him was a duplicate of the needle which he saw in use in defendant's factory; but we think this is the unmistakable purport of his evidence. His inspection was hasty; but, if he were mistaken, it would be easy for defendant to say so; on the contrary, defendant offered no proof on this point.

[3] The fact as to whether the defendant did or did not use these infringing needles can hardly be a matter of dispute, and must be easily ascertained. While we think the bill should not have been dismissed for this defect in proof, yet we are not inclined to direct a decree for appellant. The subject should be followed up, on motion of the court, if necessary, far enough to develop the facts. The case should be set down for a further hearing, at which defendant may offer proof to meet, and plaintiff may offer proof to strengthen, the prima facie, though vague and unstatisfactory, case already made. Butterfield v. Miller (C. C. A. 6) 195 Fed. 200, 210, 115 C. C. A. 152; Ferrell v. Prame (C. C. A. 6) 206 Fed. 278, 124 C. C. A. 342.

[4] We think these claims, 1, 7, and 10, are valid. Owing to the contest in the Patent Office over their validity, and the action taken there by successive tribunals, the claims have more than the usual support in the presumption of validity arising from issue. The improvement made seems, theoretically and apparently, to have utility, and its considerable use in the Davis machine, and its now supposed adoption by Beattie and defendant, confirm its utility. We cannot adopt the view that it was merely an improvement in the needle, and therefore—perhaps—not rightly protected by being claimed in combination with the machine. Langan v. Warren Co. (C. C. A. 3) 184 Fed. 720, 107 C. C. A. 631. True, the only substantial change was in the form of the needle; but this required corresponding changes in the form and adjustment of co-operating parts, and the offset permitted this needle and the other parts to unite in producing a chain

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of stitches and delivering it from the needle in a way that would not otherwise have been possible.

[5, 6] However, the fact that the patented improvement has directly to do only with the shape of the needle has another bearing. The patentee cannot be entitled to recover the profits of using the entire machine, other parts of which have been properly, though unnecessarily, put into claim combination with the needle. The profits to be recovered must therefore be confined to those resulting from using the Davis needle, as compared with the use of a straight needle. We cannot foreclose an inquiry into the existence of some intelligible basis for such comparison, but we think that before any accounting is ordered for profits, as distinguished from those damages which might be shown by any of the accepted measures (e. g., see U. S. Frumentum Co. v. Lauhoff [C. C. A. 6] 216 Fed. 610, 617, 132 C. C. A. 614), the trial court should be satisfied that there is some theory of recovering profits plausible enough to justify an effort to establish it (Ludington v. Leonard [C. C. A. 2] 127 Fed. 155, 62 C. C. A. 269; Merriam v. Saalfield [C. C. A. 6] 198 Fed. 369, 371, 117 C. C. A. 245; Rushmore v. Badger Co. [C. C. A. 2] 198 Fed. 379, 381, 117 C. C. A. 255; Gaines v. Rock Spring Co. [C. C. A. 6] 226 Fed. 531, 543, 141 C. C. A. 287).

It is not important to pass upon the validity of the other claims sued upon. They are not broader than 1, 7, and 10, and cannot affect the scope of injunction or accounting.

The opinion of the court below (Westenhaver, District Judge), except with reference to the Beattie machine, follows:

Complainant's bill charges infringement by defendant of claims 1, 5, 6, 7, 8, 9, 10 and 11 of letters patent No. 1,050,432, issued January 14, 1913, to Edwin O. Davis. The answer denies infringement, and also sets up the invalidity of complainant's patent. The defendant is using what is known as the Hepworth machine, which, it is claimed, infringes claims 1, 7, 10 and 11 of said patent, and also what is known as the Beattie machine, which, it is said, infringes claims 5, 6, 8 and 9 of said patent.

The Davis patent was issued on application filed April 22, 1909, serial No. 491,511. The specifications and accompanying drawings describe the invention as relating to improvements in machines for uniting knit fabrics, the machine being adapted to unite or connect the meeting edges of two pieces or portions of knit fabric by joining the loops of the adjacent edges thereof by means of an elastic seam or chain of stitches. There are three pages and seven figures of illustrative drawings. The specifications comprise five pages. Apparently the application, when made, covered numerous improvements in a machine for uniting knit fabrics, but the invention, as finally allowed by the Patent Office, is, as a matter of fact, limited to a single part of the machine known as "a stitch-carrying guide arm." All of the other elements of the machine and of the combination are on this hearing conceded to be old and to have been a part of the prior art.

The parts of the machine with which this stitch-carrying guide arm is combined need to be only briefly described. They consist of a circular disc or dial, varying in size on different machines from approximately 12 to 20 inches in diameter, around the periphery of which, and extending outwardly therefrom, are projected impaling pins. These pins are about an inch in length and are in a plane horizontal to the dial. These pins are adapted to receive the looped edges of the two pieces of fabric to be united or joined together by loops or stitches. The edges of the fabric are placed by hand on these impaling pins, and the dial is rotated by the operating mechanism at

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slow speed, bringing the edges of the fabric under the stitching or looping mechanism of the machine. This mechanism consists of a thread-carrying needle, a thread-carrying looper, and the stitch-carrying guide arm. The thread-carrying needle and the looper, operating reciprocally, and co-operating with the guide arm, perform the function of stitching or looping together the two edges of the knit fabric.

In other and similar machines for uniting knit fabrics, the stitch-carrying guide arm is called a "stitch finger," or "stitch needle," and sometimes a "chaining needle"; but in all of them the function to be performed by the guide arm is exactly the same. The method of operation is also precisely the same. The controversy here comes down to a few limited features of the construction, method of attachment and of operation of the stitch-carrying guide arm of complainant's machine as compared with the machines alleged to infringe it, and others.

The mechanism by which the dial, thread-carrying needle and the looper, and the guide arm, are operated, need not be described, because these features do not enter into the alleged infringment. Claims 1, 7, 10 and 11 are chiefly in controversy. They are as follows:

"1. In a machine for uniting knit fabrics, a series of impaling pins, a yielding stitch-carrying guide arm provided with an offset depressed tapered portion extending above a plurality of the adjacent loops of fabric to be united on said impaling pins, and a reciprocating thread needle and looper co-operating with said offset tapered portion of said guide-arm."

"7. In a machine for uniting knit fabrics, a series of impaling pins, a stitch-carrying guide arm comprising a shank portion and an offset pointed free end extending in a horizontal plane parallel with and in close proximity to a plurality of said impaling pins and adapted to ride upon the adjacent loops of fabric to be united on said impaling pins, and a reciprocating thread needle and thread-carrying looper co-operating with said tapered offset free end of said guide arm and inclosing the same in a chain of elastic stitches extending through the subjacent loops of fabric a substantial distance from the zone of initial stitch formation by said thread needle and looper."

"10. In a machine for uniting knit fabrics, a ring of impaling pins, a reciprocating thread needle and thread-carrying looper, and a stitch-carrying guide arm comprising a shank portion and a tapered portion offset from said shank portion and extending in a horizontal plane parallel with and in close proximity to a plurality of said impaling pins said tapered offset portion being adapted to ride in frictional engagement with the loops united on said impaling pins by the chain of stitches and forming a zone of retreat for the stitches.

"11. In a machine for uniting knit fabrics, a series of impaling pins, a stitch-carrying guide arm terminating in a tapered free end extending parallel with and in close proximity to a plurality of said impaling pins, and a thread needle and thread-carrying looper adapted to pass beneath and over said tapered free end, respectively, and forming a chain of stitches about said tapered free end and through the subjacent loops of fabric on said impaling pins for a substantial distance from the zone of initial stitch formation."

These claims are said to be infringed by the chaining needle or stitch-carrying guide arm of the Hepworth machine, used by defendant at its hosiery factory at Elyria, in this district. All the elements in the combination described by these claims—the dials, thread-carrying needle, the looper and guide arm—are common in machines for uniting knit fabrics. Prior patents and machines sold and used in the United States at least two years prior to the date of complainant's application will be referred to later in this opinion.

That which is new in these claims, if anything is, is the yielding feature of the stitch-carrying guide arm, and the offset depressed tapered portion of the guide arm. The guide arm of the anticipating machines and patents is tapered, but the free end is not offset nor depressed. The base end by which the guide arms are fastened to the machine is not yielding in the other machines. The free end does not extend parallel with the subjacent impaling pins, and is not adapted to ride upon and in frictional engagement with the impaling pins, or the fabric being united, but, on the contrary, does not come

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into contact with the impaling pins, nor ride upon the pins or fabric, and is adjusted at a slight angle or incline from the fixed base to the tapered free end.

It is claimed for the Davis machine that this type of guide arm operates better when no fabric is being united, and that a closer elastic stitch may be made thereby; also that the spring at the base, to which the yielding feature is due, permits the arm to be lifted upwards and the dial to be moved backwards, if necessity therefor arises, and that by depressing the guide arm upon the pins and creating a frictional engagement with the subjacent pins, the stitches are shed off more efficiently when the fabric is not being united.

Respecting claim 11, the only new features claimed are that the tapered free end extends parallel with a plurality of impaling pins, and that this free end extends a substantial distance beyond the zone of initial stitch formation. The new features above described are said to constitute patentable invention, not disclosed by the prior art, and are infringed by the guide arm of the Hepworth and Beattie machines.

The file wrapper of the Davis patent shows an extended history. The application was filed April 22, 1909, and, although diligently prosecuted, the patent was not issued until January 14, 1913. Numerous prior patents were cited by the examiner of the Patent Office against the claims of the application as originally made, and as amended from time to time. An interference was finally declared between the application and others then pending. The issue of this interference was set forth in a count as follows: "In a machine for uniting knit fabrics, the combination with a series of impaling pins, and a reciprocating thread needle and looper; of a guide arm provided with a pointed offset free end carried above and in alignment with the adjacent loops to be united on said impaling pins, and adapted to receive and carry a chain of stitches as formed by said reciprocating thread needle and looper."

The primary examiner held that patentable novelty or intention was not stated in this count, and an appeal was taken therefrom to the Board of Examiners in Chief, which affirmed the decision of the primary examiner. A further appeal was taken from this decision to the Commissioner of Patents, resulting in affirmance of the Board's decision.

Among the prior patents cited in the Patent Office, showing anticipation, was a British patent to Julius Koehler, No. 16,937, dated August 23, 1901. Machines embodying the Koehler patent were made in Germany, imported into the United States as early as 1906, and were sold and used more than two years prior to the Davis application, in various factories. The stitch-carrying guide arm of the Hepworth patent is said in these interference proceedings to resemble the guide arm of the Koehler patent, and of the German machine, much more closely than the guide arm of the applicant.

An examination of the three opinions rendered in these interference proceedings shows that the features, if any, considered to be patentable, were strictly limited to the difference in construction between the guide arm or stitch needle shown in the drawings and specifications of the Davis application, namely, the offset depressed tapered free end, and its yielding feature. The advantages in operation, and the increased efficiency from this method of construction as already set forth, are the only features, it appears, justifying the allowance of a patent with claims strictly and correctly embodying the same. The stitch needle or guide arm of the Koehler machine was straight, with a tapered free end; but it was not offset and depressed, and was not so adjusted at the shank or base as to yield, nor was the free end parallel to the subjacent impaling pins, and did not ride on these pins or the fabric to be united.

In view of this history, complainant's patent and claims thereof must be limited to these features. The applicant has limited himself in the proceedings in the Patent Office, and cannot here ask for a broader interpretation. In my opinion, the guide arm or chaining needle of the Hepworth machine does not possess any of these features, and therefore does not infringe. It is about 1¼ inches in length; it is straight, and tapered to a point. It is

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not attached at the base, so as to yield. It has no offset depressed tapered free end. It inclines slightly from the base to the free end. Its free end is not parallel with, nor adapted to ride upon or in frictional engagement with, the subjacent impaling pins or the fabric to be united. It has, therefore, none of the distinguishing features of the Davis stitch carrying guide arm upon which the patent was allowed. It is in all substantial respects a reproduction of the chaining needle of the Koehler machine.

The contention is made in argument that the guide arm is offset from the slotted base by which it is attached to the operating mechanism, and that this embodies the offset depressed tapered free end of the Davis machine. This contention cannot be sustained. The offset and depression of the Davis machine is of its tapered free end, and not of its base.

The contention is further made in argument that the Hepworth chaining needle is yielding because the weight of the metal of which it is constructed is so light that the tapered end will spring or yield at pressure, and thus come into contact with frictional engagement with the subjacent impaling pins and fabric to be united. This contention cannot be sustained. An examination of the needle shows that a great deal more pressure is necessary to cause the tapered free end to yield than is present during the operation of the machine. Even if enough pressure were applied to the free end, it would do no more than bring the point into contact with the subjacent impaling pins, and would not become parallel to or ride upon and in frictional engagement with the impaling pins or a plurality thereof. Its slant or angle of incline and base, its method of performing its function when the machine is in operation, are substantially, if not exactly, those of the Koehler machine. I see no true resemblance between it and the stitch-carrying guide arm of the Davis patent.

The charge of infringement as to all the claims of the patent, except claim 11, must, as to the Hepworth machine, be denied. * * * Claim 11, above quoted, it will be observed, is not limited to the yielding feature, the offset depressed tapered free end, adapted to ride upon the subjacent impaling pins or fabric, or in frictional engagement therewith. Defendant contends that, unless the language of claim 11 is to be limited, this claim must be held to be invalid. I am of opinion that the language of claim 11 does not admit of limitation to these features. I shall therefore consider whether or not it is valid.

If the guide arm of claim 11 is distinguishable from the prior art, it must be because the tapered free end extends parallel with a plurality of the subjacent impaling pins, and because the tapered free end extends a substantial distance beyond the zone of initial stitch formation. Complainant claims no more novelty under claim 11 than is embodied in these features. It is true the guide arm or chaining needle of the prior art does not show a tapered free end parallel with the impaling pins, as already stated. The free end inclines at a slight angle. That free end is in close proximity to a plurality of impaling pins, but is not parallel with the pins.

The tapered free end of the guide arm of the prior art does extend some distance beyond the zone of initial stitch formation. The drawings of the Koehler patent are not very complete, or easily read in this respect; but all the witnesses who bought and used the Koehler machine from the year 1906 to the present time testify that the end extended from three to five pins beyond the zone of initial stitch formation. The drawings of the Davis application show the end extended only three pins beyond this zone. The guide arm actually used on the Davis machine is adapted to carry six or more.

In my opinion no patentable invention is involved in either of these alleged new features. If for any reason the tapered free end of the guide arm or chaining needle was not long enough, no invention is required to make it longer. Mechanical skill of the lowest order would be sufficient. If for any reason the tapered free end should be parallel with instead of being inclined at a slight angle to the subjacent impaling pins of the complainant's patent, no invention is required to make the change. Mechanical skill of the lowest order would be sufficient for the purpose.

As was stated by the witness Arnold, an employé of complainant, and called as its expert, claim 11 is so framed as to cover any form of guide arm that

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would be practicable. In this opinion I am sustained in part by the opinion of the Board of Examiners of the Patent Office, who say: "Nor do we see that the mere extension of the arm *h* (stitch finger) of Koehler's machine, so that it will receive a plurality of stitches, instead of a single stitch, amounts to invention."

In my opinion, claim 11 is invalid.

For the purpose of the modifications and the further inquiry herein indicated, the decree is reversed, and the case remanded. The appellant will recover the costs of this court.

(259 Fed. 250)

COMPUTING SCALE CO. v. BARNARD CO.

(Circuit Court of Appeals, Sixth Circuit. February 13, 1919.)

No. 3181.

1. PATENTS ⟹211(2)—LICENSING AGREEMENT—CANCELLATION.

Licensee to manufacture and sell a patented scale *held* to have effectively canceled its contract with the owner of the patent, under a clause of the contract between them entitling it to do so if the scale failed to be commercially successful to its satisfaction, though its notice was that it considered the device so inoperative or defective as to entitle it to cancellation, a reason which seemed primarily to rest on another clause of the contract.

2. ESTOPPEL ⟹95—CANCELLATION OF CONTRACT.

If the owner of a patent knew that his licensee deemed the contract between them ended not later than the end of a royalty period to which his suit for royalties was directed, and realized that a demand by him for royalties would bring a cancellation by the licensee under another clause of the contract, and nevertheless kept silent for the longest period permitted by the statute of limitations, he would be estopped to insist that there had been no effecual cancellation by the licensee.

3. PATENTS ⟹211(2)—LICENSING AGREEMENT—CONSTRUCTION.

Where the contract, whereby the owner of a patent licensed manufacture and sale, gave the licensee right to cancel if the device failed "to be commercially successful to the satisfaction" of the licensee, there was no necessary intent that commercial success could be decided only by actual manufacture and commercial sale, the reasonable meaning being that, if the licensee found itself not satisfied within the time limit specified that the device would be a commercial success, it might cancel.

4. PATENTS ⟹219(5)—LICENSING AGREEMENT—CANCELLATION FOR LACK OF SATISFACTION—EVIDENCE.

In an action for royalties due under an agreement licensing the manufacture and sale of a patented scale, evidence *held* insufficient to show that defendant licensee was in fact satisfied with the scale as commercially practicable, but only pretended not to be, acting in bad faith and to injure the patent, when it exercised its right to cancel the agreement, under a clause permitting such action if the scale was not commercially successful to its satisfaction.

In Error to the District Court of the United States for the Western Division of the Southern District of Ohio; Howard C. Hollister, Judge.

Action by the Barnard Company against the Computing Scale Company. To review a judgment for plaintiff, defendant brings error. Reversed and remanded.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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In July, 1907, the Barnard Company owned a patent then recently issued to Barnard, its president and manager, for improvements in computing scales. Barnard exhibited the device to the officers of the Scale Company, and they desired to obtain a right to control the invention. Accordingly, a formal and rather elaborate written contract was executed, by which the Scale Company was to have an exclusive license for the term of the patent, and was to pay an agreed royalty for each instrument manufactured. The minimum amount of royalty for the first year and a half was to be $5,000, to be paid in advance on the signing of the contract. The minimum for the next year was to be $5,000, also to be paid in advance for that year. Thereafter the annual minimum was to be $10,000, payable quarterly. The feature of the contract which controls the present controversy is paragraph 10, which reads as follows (for convenience of later reference, we identify the three clauses of this contract by inserting the reference letters a, b, c):

"10. (a) In case the said patented invention hereinbefore referred to shall, for any reason, prove to be inoperative or defective, the said party of the second part shall have the right to cancel this agreement, provided the said party of the first part fails or neglects to cure said defect within a period of 90 days after receipt of a written notice from said party of the second part setting forth said defect, and, to the best of its knowledge, the reasons therefor. (b) It is also agreed that, should said scales containing said invention or any part thereof, fail to be commercially successful to the satisfaction of the party of the second part, it may, by giving a 60-day written notice before the expiration of 2½ years from the date hereof, terminate this agreement at the end of 2½ years from the date hereof. (c) And further, if after a period of 2½ years from the date hereof, the party of the second part finds that it cannot continue to make scales containing said invention or any part thereof commercially successful and profitable, it may, by giving a 6 months' written notice to the party of the first part, terminate this contract and surrender all its rights thereunder."

Barnard sent to the Scale Company two models of complete scales with his invention—the drum form and the fan form. The Scale Company made the advance payment covering the 18-month period, which would extend until January 20, 1909, and proceeded to make experiments and tests with one of the models. On June 16, 1908, the Scale Company wrote a letter to Barnard. The letter and all copies have been lost or destroyed, and the Scale Company officer who wrote it is dead. Evidence of its contents depends on Barnard's recollection. He says that it pointed out what were said to be defects in the operation of the model, suggested causes therefor and asked that he remedy them if possible. He further says that he at once went to the Scale Company's factory prepared to undertake remedying the defects, but that he was not given any help or co-operation in so doing. The substance of the complaint, in the final result, was that the model, at certain points, varied more than half an ounce above or below accuracy. It was customary for official inspectors throughout the country to permit inaccuracies of not more than three-eighths of an ounce, this permission being known as "tolerance," but a variation of half an ounce would bring frequent condemnation.

On January 20, 1909, the Scale Company sent, and Barnard received, this telegram: "Under our privilege in clause 10 of agreement, we cancel contract between us; see our letter June 16 last year." This telegram was confirmed by letter dated January 21. On January 23, the Barnard Company replied through its attorney:

"Your telegram addressed to Arthur W. Barnard, dated January 20, 1909, has been referred to me, and I am instructed by my client, the Barnard Company, to inform you that it does not accept the cancellation of the contract, and it does not admit that under the terms of the contract referred to in the telegram, the Computing Scale Company has any right to cancel the same. I am further instructed by my client to demand the payment of the sum of $5,000 due under the terms of the contract."

After further correspondence, the Scale Company, on March 15, 1909, wrote as follows:

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"We have but to refer you to our letter of June 16, 1908, wherein we call attention, specifically, to fatal defects in the Barnard invention, and these not being corrected we consider the entire matter at an end. We certainly will be pleased to consider a new proposition if Mr. Barnard or any one else whom he may employ can perfect the device so as to make a practical and commercially successful scale from the invention."

For the $5,000 installment, due January 20, 1909, the Barnard Company promptly brought suit in the New York courts, and eventually recovered judgment. Quereau v. Computing Scale Co., 148 App. Div. 860; 133 N. Y. Sup. 501. In 1916, the present suit was commenced in the court below to recover the minimum royalties which had accrued for the period of about 6 years. The defense was that the contract had been canceled. After trial before a jury, each party requested an imperative instruction in its favor, whereupon it was considered by the court and both counsel that a jury had been waived and the case submitted to the court; later, an opinion was filed, which was perhaps intended as a finding of facts, and judgment was entered for plaintiff for the minimum of royalty due when suit was commenced, and interest, viz. $83,200.

John M. Zane, of Chicago, Ill., for plaintiff in error.

Francis J. V. Dakin, of Boston, Mass., and Province M. Pogue, of Cincinnati, Ohio, for defendant in error.

Before KNAPPEN and DENISON, Circuit Judges, and KILLITS, District Judge.

DENISON, Circuit Judge (after stating the facts as above). Of the three possible grounds of cancellation reserved by paragraph 10 of the contract, clause (c) may be eliminated. The situation thereby contemplated never arose. This leaves only clauses (a) and (b) as possible support for the cancellation.

Under clause (a), the question was whether the device was inoperative or defective. This seems to be a question of fact, and not of opinion or judgment. If the Scale Company had wished its own judgment to be the criterion of its right to cancellation under this clause, it would have used plain language to that effect; and this conclusion is emphasized by comparison with the ground of cancellation reserved by clause (b). As bearing on this issue of fact, the questions which stand out most prominently are: (1) Whether the "patented invention" should be considered as the entire device specified in the patent claims and necessary to make an operative scale, or only as the features which were new in this scale. See Computing Co. v. Standard Co. (C. C. A. 6) 195 Fed. 508, 513, 115 C. C. A. 418. (2) Whether, after the plaintiff had sent on his scale as a sample of the invention, operatively arranged, and it developed (if it did) that this sample could not be successfully operated, plaintiff might nevertheless insist that it could be made practical by refinements which plaintiff afterwards developed or by changes which defendant might have worked out if it had tried. (3) Whether "operative" and "defective" refer to a laboratory or to an everyday use standard. All these questions are presented on this record, not independently, but as bearing on the main inquiry whether there was substantial evidence to support the special finding on that subject or the general judgment which would imply such an underlying finding. American Bank v. Miller (C. C. A. 6) 185 Fed. 338, 342, 107 C. C. A. 456.

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Since we conclude that the judgment must be reversed for another reason, and since the probability that these questions will arise again impresses us as rather remote, we think it not advisable now to discuss or decide them.

The inquiry whether the patented invention was inoperative or defective in a mechanical sense is very different from the question whether it would be a commercial success. There are sufficient reasons why this would always be true, but they are emphasized in the present case, where the device was one of extreme delicacy, where it was to be subjected to all kinds of incompetent handling and must be "fool proof," and where its accuracy must depend upon the behavior of a considerable body of mercury in a large receptacle. It would be wholly unreasonable to suppose that any manufacturer would bind himself to a large obligation which should be dependent upon the judgment of any other person or tribunal that a business would be successful. Accordingly, the Scale Company provided that if, at any time, 60 days before the end of 2½ years, it was not satisfied that the scale containing the invention was commercially successful, it could cancel the contract, but remaining liable for payment of the royalty for the 2½-year period.

[1] In our judgment, the undisputed facts make out an effective cancellation under clause (b). No doubt the Scale Company, by its telegram of January 20, had in mind a desire to end the contract under clause (a). If it could make that kind of termination effective before the January 20 payment was due, it could avoid that payment and save $5,000. Under this contract, however, there is no reason why a cancellation primarily resting on clause (a) may not also rest on clause (b). The greater always includes the less, and if a patented invention is defective, it naturally follows that it will not be a commercial success. When, therefore, the company declared, as it undoubtedly in substance did on January 20, that it considered the device so inoperative or defective as to entitle it to cancellation, it necessarily declared that the device would not result in commercial success to its satisfaction.

If there were doubt about this conclusion, it would be removed by the letter of March 15, 1909, which contains an express declaration that there are fatal defects in the invention, and that the Scale Company considers the entire matter at an end, but that it would be willing to consider the proposition anew if it could be shown any way "to make a practical and commercially successful scale from the invention." We think it beyond doubt that the Scale Company then, if not before, intended to terminate the contract, and intended to rest that action in part upon its right to cancel under clause (b), that it sufficiently declared such intention, and that Barnard could not have misunderstood this cancellation.

[2] We cannot fail to notice that, so far as this record informs us, Barnard did not, until the commencement of this suit, make any claim that the contract was not ended as of January, 1910, nor make any demand for royalties thereafter accruing. There was a further right of cancellation under clause (c), of which it was not unlikely

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the Scale Company would have attempted to avail itself, if it had known that Barnard considered the contract still in force. If in truth he knew that the Scale Company deemed the contract ended not later than the end of the royalty period to which the New York suit was directed, and realized that a demand by him would bring a cancellation under clause (c), and nevertheless kept silent for the longest period permitted by the statute of limitations, it would at once be evident that he must meet the charge of estoppel so arising. The prosecution of the New York suit was not necessarily inconsistent with acquiescence by Barnard in a termination effective in January, 1910; and his letter of January 23, refusing to accept the cancellation attempted, is also not certainly in conflict with such acquiescence, because it refers directly only to the Scale Company's claim that the contract ended in January, 1909. However, the New York proceedings or other matters not in this record may show such claims by Barnard as will acquit him of any intent to mislead the Scale Company by his silence. We therefore do not rest our conclusion in any degree upon the rule of estoppel.

[3] The right to cancel under clause (b) did not depend on any precedent manufacture of the device and putting it on the market. The language used, "fail to be commercially successful to the satisfaction of the party of the second part," does not necessarily imply an intent that commercial success could be decided only by actual manufacture and commercial sale; but, under the conceded circumstances here existing, such intent would be so very improbable that only the clearest language could justify that interpretation. It was known to both parties that the actual manufacture and the attempt to sell, in any such quantities as to be a fair test of how much it would cost to make and how acceptable the device would be, would involve expenditure of thousands and perhaps tens of thousands of dollars. No manufacturer would intentionally contract that, although he was satisfied that a device would not be a commercial success, he should, nevertheless, go ahead, and put it on the market at his own risk. The reasonable meaning of this clause (b) is that, if at any time within the limit specified the Scale Company finds itself not satisfied that the device will be a commercial success, it may cancel.

[4] The only remaining question is whether the Scale Company was in fact satisfied. The legal rules applicable to this question were fully stated by this court in American v. Kussell, 232 Fed. 306, 146 C. C. A. 354, L. R. A. 1916F, 882, and there is no occasion to repeat them; the whole matter is one of their application.

We must approach this question recognizing that, since there was a general finding for plaintiff and since that finding would be sufficiently supported if the record contained evidence fairly tending to show that the Scale Company's claim of dissatisfaction was made in bad faith and while it was in truth and in fact satisfied that the device would be a commercial success, the matter of law for us to decide is whether there was any substantial evidence to that effect; but we are neither embarrassed nor aided by the presence of any finding by the district judge on that question. He was of opinion

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that actual effort to put upon the market was necessary before the Scale Company was at liberty to assert its failure to be satisfied with commercial success, and hence he considered the evidence only from the standpoint of the actual merits of the article, and not with reference to whether the company was really satisfied.

We have here a device intended to be a part of a complicated mechanism, and, for its own accurate operation, dependent upon the behavior of a large amount of mercury in a receptacle and under all sorts of conditions of rough handling and of temperature. For its commercial success it was dependent not only on the actual performance of the mercury and co-operating parts, but upon what the ordinary storekeeper and prospective customer would think or believe about this operation. Any manufacturer, deciding whether to be sufficiently satisfied of the commercial success of this device to make the necessary investment, would not overlook this situation, and it emphasizes the burden of those who say that the manufacturer was satisfied when he says he was not. Putnam, C. J., in Gilman v. Lamson Co. (C. C. A. 1) 234 Fed. 507, 512, 148 C. C. A. 273. The burden in this case is unusually heavy, and the quality of that burden gives unique color to the question whether there is sufficient evidence to support the conclusion. This was an elaborate and delicate machine; plaintiff made two or three, in a period of several years; each obviously cost him a commercially prohibitive sum; nobody else ever made one; nobody ever sold one; to be a commercial success it must be sold in large numbers and for a moderate price; defendant was willing to lose its $5,000 or $10,000 rather than try to make and sell; and yet plaintiff must justify a finding that defendant was really satisfied that this untried business would be a "commercial success." It is not impossible that a plaintiff could carry even that burden; but such a claim challenges unusual scrutiny.

By this record we find that five witnesses for the Scale Company—all who had anything to do with the matter and who are living—testify that they tested and experimented with the drum model furnished by Barnard, some of them casually and some of them thoroughly, and that it would not operate accurately and reliably. Three of them, the factory superintendent, the expert, and the skilled workman especially charged with the duty, continued their experiments and tests over several weeks, and finally the model was condemned as "no good." They all agree that it not only would not work with the necessary accuracy, but that, by the aid of whatever knowledge and skill they had, they could not make it work and did not know how to do so. In addition, it appears that Barnard seemed to acquiesce in the conclusion that this model was not satisfactory in its then condition, and that when, considerably later, Barnard undertook to produce a perfected example, the task occupied him and a skilled worker some 6 months.

As against this, we find nothing, excepting certain circumstances, which are said to show bad faith in the claim of dissatisfaction. We are not impressed that these, singly or collectively, have any substan-

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tial tendency in that direction. We will consider them briefly. They are:

(1) That the contract was oppressive and harsh as against Barnard, and suggests overreaching. We cannot so regard it. There seems no reason to doubt that the Scale Company agreed to pay and did pay a fair, if not a liberal, price for an option of 2½ years upon an untried and uncertain invention. Of course, the invention would be somewhat discredited, if it were to be rejected at the end of that time; but that the Scale Company would pay $10,000 for the sole purpose of temporarily suppressing and later disparaging the invention is mere surmise.

(2) That the Scale Company officers did not go to work to build new models or co-operate with Barnard in the effort to make the device successful after they had made up their minds that it was unsatisfactory. This is true; but they were under no obligation to do so.

(3) That they reached their conclusion adverse to the success of the device as early as the first of the year 1908, and did not give any notice till June, or attempt to cancel until the next January. This, also, is true, but it does not militate against their good faith. They had paid for the exclusive right to the invention till January 9, 1909, and if they had concluded that they did not want the license for the further term, there was no reason why they should turn it back until the paid-up term expired.

(4) That they tested only the drum model, and did not test at all the fan model. True; but two-thirds of their product was of the drum style, and, unless the device would be successful on that style, it is not to be supposed that they would want to buy it for use on the minor fraction of their output and at the price contemplated for the whole. If the drum style was not satisfactory, it would be a waste of time to experiment with the fan style.

(5) That the model made, first exhibited to some of the officers of the Scale Company, satisfied them of its performance. This is true; but it was only in a preliminary and general way. If that provisional acceptance was to foreclose a later rejection, there was no occasion for either clause (a) or (b) of paragraph 10. It will not do to say that acceptance of a device as good enough to give a thorough try-out with an agreement to purchase if found commercially satisfactory, is itself evidence legally tending to show that it later was found to be satisfactory; this makes the contract self-destructive.

(6) It is also said that the difficulties, which led to the rejection of the scale, had to do with other parts than those which constituted plaintiff's invention; hence, that a rejection for these reasons could not be in good faith. If it were to be assumed that plaintiff's invention pertained only to his new parts, and not to the whole combination, still this claimed result could not follow. The motion of the weight and price indicating devices was to be governed by the extent to which a plunger would descend into the mercury. It would do so until it had effected sufficient displacement of the mercury to stop its descent. Obviously, the result would depend in essential degree upon the precise shape and size of the plunger. The evidence

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is highly persuasive that the Scale Company's experts abandoned their work with the model after concluding that sufficient precision in these respects was a matter of infinite "cut and try" with reference to every varying model, and that there was no scientific method of ascertaining the necessary proportions. The expert workman who, as a witness for the Barnard Company, said he succeeded in making a perfect instrument, also testified that part of the time spent by him in its perfection—six or eight months—was spent in this "cut and try" adjustment of the plunger to the demands upon it. It is true there was testimony at the trial indicating that a method of scientific determination could have been developed by one sufficiently expert, but there is nothing to indicate that either plaintiff or defendant knew this until long after the end of the two and a half year period. However, even a conclusion that the trouble was due to defects in other parts of the scale would be unavailing, for clause (b), unlike clause (a), has reference not to "the said patented invention," but to "said scales containing said invention, or any part thereof."

(7) Defendant's expert, who made the final tests and condemnation, testifies:

> "I finally came to the conclusion that on account of the extreme difficulty in getting a combined and perfect action of the whole system, as being somewhat of the 'cut and try' principle, and no rule or system by which the scales could be produced expeditiously and accurately without too much experimenting and the cost of the same being so great, that I considered that the device was not practicable as a machine to be manufactured with profit, taking into consideration the various devices which the Computing Scale Company already had in hand. However, I gave it a final test before abandoning work upon it, but with no better success."

It is suggested that the phrase "taking into consideration the various devices which the Computing Scale Company already had in hand" supports an inference of bad faith in the rejection. On the contrary, this was one of the very considerations rightly to be observed in deciding whether "the device was practicable as a machine to be manufactured with profit"—in other words, whether it would be "commercially successful." Surely, the contract did not contemplate that the Scale Company should discontinue or turn away from other more simple and more profitable forms, and confine itself to this. This device could not be "commercially successful" in the fair sense implied by those words in this situation, and so as to justify paying $10,000 a year for its use, unless it could stand comparison with the other things for which it was to be substituted or which might be substituted for it.

Upon the whole case, we cannot escape the conviction that even if it be assumed that there is evidence tending to show the device to have been good enough so that the Scale Company ought to have been satisfied that it would be a commercial success, this is the extreme limit of the tendency of the proofs; that to allow the testimony in this record to prevail against the rejection of the article would be to overlook the established and peculiar force of contracts "to satisfy"; and that to support the conclusion that the Scale Company was in truth satisfied but only pretended not to be, acting in bad faith and with the intent to injure Barnard's patent, there is only suspicion. This is

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not enough. Ferrell v. Prame (C. C. A. 6) 236 Fed. 727, 728, 150 C. C. A. 59.

The judgment must be reversed, and the case remanded for a new trial.

(259 Fed. 258)

DUNN WIRE-CUT LUG BRICK CO. v. TORONTO FIRE CLAY CO. et al.

(Circuit Court of Appeals, Sixth Circuit. January 7, 1919. On Motion to Reopen, May 6, 1919.)

No. 3142.

1. PATENTS ⟹36—PRESUMPTION OF INVENTIVE NOVELTY FROM USE—ATTRIBUTION TO PRODUCT.

Though brick of a certain type, which have gone on the market and had a large sale, are the product of the patentee's patented machine, which has been manufactured by him and sold to brickmakers, such credit and such presumption of inventive novelty as arise from public use should be given to the product, the bricks, and not to the machine.

2. PATENTS ⟹328—VALIDITY—INVENTIVE CHARACTER—PAVING BRICKS.

Dunn's patent, No. 918,980, for wire-cut paving brick having wire-cut ribs on the side, *held* valid, because the concept had inventive character, as distinguished from mere skill.

3. PATENTS ⟹8—NEW PRODUCT—VARIATIONS IN METHOD OF MAKING.

The inventor of a new and useful product or article of manufacture may have a patent covering it and giving a monopoly upon it, regardless of great variations in the method of making.

4. PATENTS ⟹8—METHOD AND PRODUCT—SEPARATE PATENTS.

In the ordinary and typical case, the method of manufacture and the product manufactured are separable inventions supporting separate patents, one of which may be valid and the other not.

5. PATENTS ⟹328—PRODUCT PATENT—INFRINGEMENT BY MANUFACTURING DEVICE.

Dunn's patent, No. 918,980, for wire-cut paving brick having wire-cut ribs on the side, *held* infringed by the product of defendant's manufacturing device.

6. PATENTS ⟹226—INFRINGEMENT—WHAT CONSTITUTES.

As between plaintiff's earlier and defendant's later patent, a finding that the earlier device, if later, would not have infringed the later patent, is not helpful in deciding whether defendant's device infringes plaintiff's patent.

On Motion to Reopen.

7. PATENTS ⟹324(1)—LATE INTRODUCTION OF EVIDENCE—CONDITIONS OF PERMISSION.

In suit for infringement of patent, where, after direction of the usual interlocutory decree on finding of infringement, defendants present foreign patents said to anticipate plaintiff's product, and ask leave to apply to reopen the case and put them into the record, on account of the public interest and the interest of the courts, the proposed evidence will be permitted to be brought into the record on defendants' meeting additional expenses of another trial; their showing to excuse failure to put in the evidence in due time not being satisfactory.

Appeal from the District Court of the United States for the Eastern Division of the Southern District of Ohio; John E. Sater, Judge.

Suit in equity for infringement of patent by the Dunn Wire-Cut Lug Brick Company against the Toronto Fire Clay Company and

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⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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others. From decree dismissing the bill, plaintiff appeals. Order entered that the District Court have leave to reopen the case, etc.

J. C. Sturgeon, of Erie, Pa., and S. H. Tolles, of Cleveland, Ohio, for appellant.

David M. Gruber, of Steubenville, Ohio, and Joseph T. Harrison, of Cincinnati, Ohio, for appellees.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge. The company which had purchased the patent appeals from the decree dismissing its infringement bill brought against the Toronto Company and Nicholson, and based upon patent No. 918,980, issued April 20, 1909, to Dunn, for paving brick. The trial court overruled the defense of invalidity, but held that there was no infringement, and both of these subjects must be determined.

Brick were originally made by molding or pressing in individual dies or forms. The product was a molded brick or a pressed brick. It was found to be cheaper to squeeze the plastic clay through a die shaped like a cross-section of the finished brick and producing a continuous blank from which pieces could be cut or sliced off to form separate bricks. Because it came to be the more common practice to slice off these bricks from the blank by using a moving wire as the cutting edge (either one wire at a time or several in a gang), bricks of this class came to have the name "wire-cut bricks." Whether the cutting was done by wire or a knife or a saw was not important, because these methods are, in any broad sense, obviously equivalent. A cutting wire works like the cutting edge of a knife, and the cutting edge of a knife, is, for this purpose, a wire; hence all such brick whether sliced by wire or knife or saw, are, in the trade, universally called "wire-cut brick."

For paving, it is desirable that the brick should not fit close together, but should be spaced slightly apart, in order that waterproofing and adhesive material may fill the interstices and make a perfect bond. Accordingly, they were made with buttons, ribs, or slight projections of other forms upon one or both of the vertical faces of the two adjacent bricks. These were formed by suitable depressions in the dies in which the pressing was done; and, up to Dunn's time, all paving brick with lugs or ribs had been repressed brick. Dunn observed, and seems to have been the first fully to understand, that, for the purpose of paving, the brick were injured by this repressing. The surface was too smooth, the corners were not sharp enough, and the texture or lamination was distorted; but the ordinary wire-cut brick were unsuitable for this purpose, because they had no spacing ribs. It seems fairly to be inferred that, if the idea of putting ribs on wire-cut brick had occurred to any one, it had been rejected because of the difficulties or expense involved. In ordinary hand operation, to get this result would necessarily be slow, and operating upon such material would be likely to break away parts of the brick or ribs and produce defective brick.

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In this situation, it occurred to Dunn that, by the same operation by which he cut off the brick from the blank by sweeping the cutting wire across its face, he could leave ribs along the face, and he could accomplish this result by making the cutting edge irregular, instead of straight. In the form in which he developed his idea, he carried the wire on each side of his blank of clay in a slot which was straight most of the way, but included two semicircular offsets. The result was a brick, plane upon each side, excepting where crossed by two projecting ribs. He first applied for a patent upon the machine accomplishing these results, but, while that application was pending, filed also an application for a patent upon the product of his machine. This is the patent in suit. The patent upon the machine was not issued until September 7, 1909. The first claim of the patent in suit is:

"As an article of manufacture, a wire-cut brick having wire-cut ribs on the side thereof, substantially as set forth."

[1] Dunn's product has been very largely accepted as a better paving brick than before existed. Although the brick of this type which have gone on the market and had this large and wide sale are the product of his patented machine, which has been manufactured by him and sold to brickmakers, yet such credit and such presumption of inventive novelty as arise from public use should be given to the product, and not to the machine. There would be no use for the machine, unless the product were desired. We therefore give some weight to this wide public use as bearing on the patent's validity.

[2] We think Dunn's concept had inventive character as distinguished from mere skill. The fact that this very simple product, which proved to be so useful, never had been developed during all the progress of the art, goes far to give it character. Repressing, with its cost and disadvantages, was avoided and a better brick was produced by simple means. We agree with the District Judge in saying:

"His brick is new and useful, and involved invention in no mean degree, and entitles him to the breadth of equivalency pertaining to an invention of that character"

—and agree also with his summary quoted in the margin.[1]

Without regard to whether a patent upon a product may be wholly independent of any thought of the means by which it is produced, there

[1] Dunn conceived and produced a wire-cut brick with wholly wire-cut lugs, thereby dispensing entirely with the repressing process and with the expenditure necessary to effect the same. The development of his concept involved much study and experimentation. He was hampered not merely by want of funds, but by the distrust, discouraging conduct, and opposition of brickmakers and engineers. However, by persistent energy and determination he overcame the obstacles encountered and eventually won recognition by practically demonstrating the commercially successful character of his brick and the mode of its production. The roughness of the sides of the brick, which at first provoked opposition, was found in actual experience to be advantageous, as the filler was thereby enabled more firmly to set and more securely to hold than is possible with the smoother surfaced brick. The demand for his brick, following the test of actual service, was such that the output rose from 2,233,000 in 1910, to 138,000,000 in 1915. In the same period he granted 33 licenses to manufacturers.

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can, in this case, be no such independence. Some degree of reference to the method of the production is carried into the claim by the words "wire-cut ribs." Where a process or a machine will produce only a specific product, and where a given product can be produced only by the specific process or machine (if there are such cases; see Macbeth Co. v. General Co. [C. C. A. 6], 246 Fed. 695, 698, 158 C. C. A. 651), it is difficult to see much lack of identity between the invented process or machine and the invented product, and such situations have given rise to some rather casual and seemingly obiter statements that process and product or machine and product constitute only one invention (e. g., Downes v. Teter-Heany [C. C. A. 3] 150 Fed. 122, 80 C. C. A. 76). It is thought that every such case will be found to depend upon this—actual or supposed—necessary identity of the means and the result.[2]

[3, 4] Certain it is, in view of the weight of authority and the latest decisions, that the inventor of a new and useful product or article of manufacture may have a patent which covers it and gives a monopoly upon it regardless of great variations in the method of making (Powder Co. v. Powder Wks., 98 U. S. 126, 136, 137, 25 L. Ed. 77; Leeds Co. v. Victor Co., 213 U. S. 301, 318, 29 Sup. Ct. 495, 53 L. Ed. 805; Durand v. Schulze [C. C. A. 3] 61 Fed. 819, 821, 10 C. C. A. 97; Maurer v. Dickerson [C. C. A. 3] 113 Fed. 870, 874, 51 C. C. A. 494; Lamb v. Lamb [C. C. A. 6] 120 Fed. 267, 269, 56 C. C. A. 547; Sanitas Co. v. Voigt [C. C. A. 6] 139 Fed. 551, 552, 553, 71 C. C. A. 535; Acme Co. v. Commercial Co. [C. C. A. 6] 192 Fed. 321, 325, 326, 112 C. C. A. 573), and that in the ordinary and typical case, the method and the product are separable inventions, supporting separate patents, one of which may be valid and the other not (Rubber Co. v. Goodyear, 76 U. S. [9 Wall.] 788, 19 L. Ed. 566). It is therefore the duty of the court to find, if it reasonably can, for a product patent some construction and scope which shall avoid, on the one hand, destroying its value—if not its validity—by confining it to the precise method of making which the patent has happened to show, and avoid, on the other hand, a construction so broad as to make it invalid because for an old product. As illustrated by the present case, if Dunn is confined to wire-cut brick with wire-cut lugs produced precisely as shown by him,

[2] We find no authoritative decision lending more color of support to the idea that a patent for a product is to be confined to the result of the described process, than may be derived from some of the language in Goodyear Co. v. Davis, 102 U. S. 222, 224 (26 L. Ed. 149). It was there said: "The invention is a product or manufacture made in a defined manner. It is not a product alone, separated from the process by which it is created." This conclusion was the result of an exhaustive study of the facts of the particular case, and was intended to refer to those facts. The claim was for "the plate of hard rubber or vulcanite, or its equivalent." The defendant did not use hard rubber or vulcanite, and the question was whether celluloid, an article unknown when the patent issued, was an equivalent. The case does not hold that if the defendant had employed a hard rubber plate he could have escaped because he manufactured this hard rubber by a process different from that described by Cummings. Nothing which was not made by the process of vulcanization could be the equivalent of the "hard rubber or vulcanite" of the claim. The process of vulcanization was imported into the claim by its very terms.

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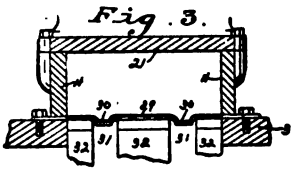
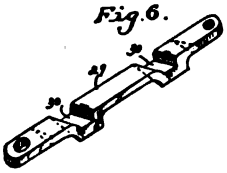
the patent is commercially worthless because easily avoided; while, if it is construed to cover a wire-cut brick which, before burning, has had irregularities produced upon its face by any cutting or carving means whatever, it would be void because of common practice relating to all kinds of tile, brick and pottery.

The theory that this patent extends only to the output of the method shown in the machine patent is inconsistent with the action of the Patent Office. Dunn first claimed "a wire-cut brick having wire-cut ribs on one side thereof formed complete during the operation of cutting the brick." This was rejected as "claiming the article by the method of making it." The Patent Office recognized and applied the rule above stated. Dunn then substituted the claim allowed and issued.

[5] The true scope of the claim can best be developed by tracing it from the form shown in the drawing to the form used by defendant. It is, doubtless, more economical to have the same stroke of the wire or cutter sever the brick from the blank and produce the ribs; but the claim cannot be so restricted without destroying the differentiation between the patent for the machine and the patent for the product. We think it clear that the patented product would be produced just the same if Dunn took a brick which had already been severed from the blank on both sides by some other wire-cutting machine, and passed that brick through his machine, using his wire-cutter to completely reshape one entire side of that brick. The brick would be wire-cut, and the ribs would be wire-cut, although one face of the brick would have been treated twice instead of once. This would not be an unnatural treatment, if it was desired to have the ribs upon any face excepting the one produced by the cutting wire. When we admit the equivalency between the cutting knife and the cutting wire, we see that this supposititious treatment is that which defendant Nicholson has adopted (and the Toronto Company uses). He first cuts his blank into separate brick by the usual wire-cutting process, then passes his severed brick along a feed table and over a cutter which he calls a knife, the form of which is shown by *29, 30* in the following figures 3 and 6 taken from the patent issued to him, No. 1,148,529 of August 3, 1915. This cutter or knife is the perfect equivalent for this purpose of a wire bent into the same form.





Defendant suggests no difference in operation excepting that he thinks such sharp corners could not be put on the ribs of a wire cutter; and this is immaterial. We must infer that this knife wholly reshapes that surface of the brick and transforms a plane surface into a surface with ribs. It seems improbable that the blank of plastic material can travel forward over this knife, with the uncut portions or ribs depending into the depressions *30* of the cutter and with the necessary

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resulting distortion of the material, without filling these depressions and causing the entire ribs to be formed and shaped by the knife. If possibly this does not completely occur, yet it is certain that the sides of the ribs are thus formed and shaped, and that, at the most, only their extreme tops—a very small fraction of their whole surface—escapes this knife or wire-cutting origin, and these rib tops have already been "wire-cut." We are convinced that, in the true sense of the patent, in the sense necessary for its right construction, the ribs on defendants' brick are "wire-cut"; the extent to which they may fail to be so formed is comparatively negligible. Thus we see that the patent grant may fairly be construed to cover a method of production slightly variant from, but practically equivalent to, that described in the patent, and yet that its monopoly will leave untouched wire-cut brick with ribs produced by hand carving or by cutting out mere channels or by any method which is not, in substantial effect, the simultaneous creation of the plane surface and the ribs thereon by a cutting edge which sweeps through the body of the clay. Just where the dividing line might be between that which thus infringes and that which would not, is not involved, and perhaps the question will never arise.

The defendants' product is the result of a two-step wire-cutting process; plaintiff's patent describes a one-step process for making his product; and it is said that for this reason infringement is avoided. We cannot find, either in the specification or claim or in the Patent Office action or in the history of the art, any reason for limiting the patent in accordance with this theory. We are convinced that to do so would not only be to disregard the basis of the existence of product patents as a class by themselves, but also would be to reissue this patent with the very claim which was rejected by the Patent Office and discarded by the applicant. The cases cited in support of restricting the patent to the one-step process are Plummer v. Sargent, 120 U. S. 442, 448, 449, 7 Sup. Ct. 640, 642 (30 L. Ed. 737); Royer v. Coupe, 146 U. S. 524, 530, 531, 13 Sup. Ct. 166, 168, 169 (36 L. Ed. 1073); U. S. Glass Co. v. Atlas Glass Co. [C. C. A. 3] 90 Fed. 724, 33 C. C. A. 254.

In our judgment, these cases do not support the argument. In the Plummer Case, the patent was for a process of lacquering or japanning, consisting, according to the claim, of "the application of oil and heat, substantially as described." In order to sustain this patent against the defense of anticipation, it was necessary to limit the process rather closely to the succession of particular steps described in the specification, and it was held that, when the patent was so limited, defendant's process was not equivalent. In the Royer Case there was also a patent for a process which was claimed as a "treatment of the prepared rawhide in the manner and for the purposes set forth." It was held that the process, in its broadest aspect, was old; that "the only subject-matter of invention which the plaintiff could properly claim was the whole process described in his patent, comprising the different steps therein set forth"; and that, "in that view, it must be shown that the defendant used all the different steps of that process, or there could be no infringement." Obviously, if the patentee's finished hide had

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been identified by some physical characteristics, and he had claimed an article of manufacture thus identified, there would have been a different question. In the Glass Co. Case it appeared that the process patented was confined by the claim to a succession of specific steps, and that the defendant omitted two of these steps. The conclusion was inevitable that "identity of method cannot exist."

[6] It is also suggested that the device of the patent in suit, if it had been later than the patent issued to Nicholson, would not have infringed that patent, and, hence, that defendants' device does not infringe plaintiff's patent. Electric Co. v. Pittsburgh Co., 125 Fed. 926, 60 C. C. A. 636, is cited to support this transposition and modification of the familiar rule—"that which, if later, would infringe, will anticipate, if earlier." The case seems hardly to support the citation; the language used by Judge Coxe (125 Fed. 930, 60 C. C. A. 636) is only a method of saying that the two things were wholly foreign to each other. If we could lay out of view the fact that plaintiff's patent is for a product and Nicholson's later patent is for a machine, it would still be true that anticipation depends upon the nature and extent of the earlier disclosure while infringement depends upon the character of the grant as fixed by the claim. The later patent is necessarily relatively specific as compared to an earlier invention; and a finding whether the earlier device, if later, would have infringed the later patent, is not helpful in determining whether the device of the later patent infringes the earlier one. The two questions have no necessary relation to each other. We have had occasion to point out that in this situation equivalency is not mutual. General Co. v. Electric Co., 243 Fed. 188, 193, 1007, 156 C. C. A. 54, 664; Curry v. Union Co., 230 Fed. 422, 429, 144 C. C. A. 564.

Nor does the fact that Nicholson uses his hands, in transferring his brick from the first wire-cutting device to the second, control the question of infringement. It is true that in Brown v. Davis, 116 U. S. 237, 249, 6 Sup. Ct. 379, 29 L. Ed. 659, the use of the human hand is relied upon as demonstrating noninfringement; but in that case one of the elements of the claim sued upon was a peculiar lever, and defendant dispensed with the lever and used his hand. This was the common case of omission of one of the elements of the claim.

There should be the usual injunction and accounting as to defendants' brick produced in the manner which we have described, and to permit the entry of such decree below, the existing decree should be set aside.

On Motion to Reopen.

PER CURIAM. [7] By opinion filed January 7, 1919, we sustained the patent in suit and directed the usual interlocutory decree. The defendants now present three German patents which are said to anticipate, and ask leave to apply to the court below to reopen the case and put these into the record. The showing to excuse the failure to find this evidence in due time is not satisfactory. It is not clear that, in the search made in preparation for the answer, any effort was made to examine foreign patents. A generally similar showing could be

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made in every case where there is a later discovery, and, if none but the parties were concerned, we should hesitate to grant the motion. Westinghouse Co. v. Stanley Co. (C. C. A. 1) 138 Fed. 823, 71 C. C. A. 189; Kissinger Co. v. Bradford Co. (C. C. A. 6) 123 Fed. 91, 59 C. C. A. 221; Novelty Co. v. Buser (C. C. A. 6) 158 Fed. 83, 85 C. C. A. 413, 14 Ann. Cas. 192.

However, others than the parties are interested. At least one of the German patents is superficially pertinent enough so that the validity of the patent in suit would be likely to be litigated over again by the next alleged infringer, both in the trial and appellate courts. In the meantime, the public would be uncertain whether the industry was or was not subject to this burden. In the interest of the public concerned with the patent, and in the interest of the courts, we think the proposed evidence should be brought into this record (Firestone Co. v. Seiberling [C. C. A. 6] 245 Fed. 937, 158 C. C. A. 225); but the plaintiff ought not to suffer damage from what is not its fault. It will be put to the additional expense of another trial in the District Court and perhaps another appeal, and a great part of this will be duplication which could have been avoided if the original defense had been more thorough. As a condition of allowing the belated defense to be now made, the defendants should meet this additional expense. The amount thereof is affected by so many uncertainties that it must be somewhat arbitrarily fixed. We apparently have the same opportunity as the trial court would have to make a reasonable estimate. We think $300 is certainly not too much to make the plaintiff good against the greater expense and delay which will result if the case is reopened and reheard upon the modified record, than there would have been if the entire defense had been originally presented.

The order will be that the District Court have leave to reopen the case and admit the proposed evidence and such further proofs as may be offered by either party in relation thereto and thereupon again determine the issue in the case upon the record as thus supplemented—all upon condition that the defendant pay to plaintiff, within such time as the court below may fix, the sum of three hundred dollars.

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(259 Fed. 266)

BIRD'S-EYE VENEER CO. v. FRANCK-PHILIPSON & CO.

(Circuit Court of Appeals, Sixth Circuit. October 10, 1918.)

No. 3127.

1. PATENTS ⟹212(1)—LICENSES—IMPLIED WARRANTIES.

Conceding that the owner of a patent, which granted an exclusive license to defendant on payment of a royalty, impliedly warranted the commercial utility of the patent, yet where the parties, after defendant had been unable to make the patent commercially successful, entered into a new contract fixing their several rights, the implied warranty was waived, and the fact that the patent process did not prove a success is no defense to an action for accrued royalties.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Patent.]

2. PATENTS ⟹1—NATURE OF PATENT.

A patent is not inherently the grant of a right to make; it is a grant of the right to exclude others from the field.

3. PATENTS ⟹209(1)—LICENSES—FAILURE OF CONSIDERATION.

Where there was no contention that the patents covered by license from plaintiff to defendant for a process for bleaching wood veneers were invalid, and the contract gave defendant an exclusive license to use the patent, with the right to grant licenses thereunder to others, the fact that the process did not become a commercial success is no ground for finding a total failure of consideration.

In Error to the District Court of the United States for the Northern Division of the Western District of Michigan; Clarence W. Sessions, Judge.

Action by Franck-Philipson & Co. against the Bird's-Eye Veneer Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Wm. P. Belden, of Cleveland, Ohio, for plaintiff in error.

Thomas J. Hickey, of Chicago, Ill., for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge. The Bird's-Eye Veneer Company was engaged in manufacturing veneer from bird's-eye maple logs. So much of the product as came from the heart of the log was "off color," and would be much more valuable if it could be bleached. The Veneer Company had never been able to find a satisfactory method of bleaching. The Philipson Company owned patents upon a process for accomplishing this result. The Veneer Company took a license under these patents and agreed to pay royalties. After making payments for a time, the Veneer Company refused to pay further, and the patentees brought this action in the court below to recover the royalty then accrued. For convenience, we designate the inventor and his first and second assignees collectively as "the patentees." The defenses (so far as now important) were, first, that there was a breach of the implied warranty that the patented process would accomplish the purpose for

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which the Veneer Company took it; and, second, that the patented process was worthless, wherefore there was a total failure of consideration. Upon the trial, the District Judge held that, as matter of law under the evidence, neither defense could be maintained, and instructed a verdict in favor of the patentees. The present writ of error presents the question whether either defense should have been sustained by the court or submitted to the jury.

We conclude that we cannot consider or decide the abstract questions which have been presented as the main reliance of the Veneer Company. We express no opinion as to whether such a license for a patented process is within the provisions of the Uniform Sales Act, nor whether there may be an implied warranty of fitness attached to a written contract therefor, nor as to whether a patented process might be, in spite of the patent monopoly, so valueless that there would be a total failure of consideration for its sale. We think these questions are not open on the facts of this case.

The process involved certain chemical actions or reactions, and the obviously difficult problem of soaking very thin sheets of wood in a chemical solution, so as to get the good results desired and avoid all the bad results which might threaten. The representative of the Veneer Works in making the contract was an experienced and able manager, familiar with manufacturing costs and the demands of his market. He was at least upon an equal footing with the patentees in all respects except as to chemical knowledge, and he was better informed than the patentees as to matters affecting commercial success.

[1] The original contract was made in April, 1914. In consideration of a license to use upon bird's-eye maple veneers the process patented by one United States patent and by one Canadian patent and the method of a patent application then pending, the Veneer Company agreed to pay $5,000 in cash and $7,500 upon deferred notes and a license fee of $300 per month after installation. For all purposes now involved, the license was equivalent to an exclusive license, and we shall so treat it. It is not to be supposed that the manager of the Veneer Company would have made this contract—which was carefully written (covering eight pages of the printed record), and went into many details, but contained neither any warranty of the process or its results nor any provision whereby the Veneer Company could escape the continuing obligation—unless the success and the value of the process had been shown to his satisfaction, and the evidence indicates exhibition of samples, etc. Thereupon the Veneer Company, under the patentees' direction, constructed and installed elaborate apparatus, use of which was begun about July. After about six months of use, or attempted use, the Veneer Company expressed such dissatisfaction that the patentees sent an expert adviser, and the company and this adviser conducted a series of tests until about March, when, apparently, the company again became satisfied. It then had paid the down payment of $5,000, and one of the $2,500 notes and five of the $300 payments, and was in arrears on two of the notes, amounting to $5,000, and on seven of the payments, amounting to $2,100.

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The parties then, in March, 1915, executed a new contract, reciting that the previous contract had been made, that certain disputes had arisen as to the amount of the license fees payable, and that the parties "are desirous of terminating the controversy, and have agreed to settle and terminate all their differences in regard to or in any wise growing out of the contract," and agreeing that the Veneer Company would pay the two unpaid notes of $5,000, and would pay $700 out of the unpaid monthly payments, and that the patentees would release the Veneer Company from the remainder. These payments were made and accepted. On May 1, 1915, the parties made a further contract by which the Veneer Company acquired the right to use the patents on veneers other than bird's-eye maple and the right to grant certain licenses under the patents to furniture manufacturers in the United States and Canada, and by which the Veneer Company acquired similar rights as to all future inventions and improvements in the process, to be made by the patentees. For these additional rights the Veneer Company agreed to pay the [minimum] license fee of $1,250 per year. The company then continued, until August, 1916, to pay regularly all license fees accruing under the original contract and under the May, 1915, contract, and continued to use or attempt to use the process. It then, in August, declined any further payments, and this suit resulted. There is (now) no claim of fraud or misleading or concealment by the patentees of anything known to them.

If there was an implied warranty of the character claimed by the company and at the time of the original contract, we cannot think that it survived the contracts of March and May, 1915, and the payments made pursuant thereto. The case is not one involving the later development of some inherent but unknown defect. In March and in May, 1915, when the new contracts were made, the company knew all about the failure of the process (if it had failed). It merely was hoping and believing that the defects had been overcome.

When the subject-matter of an alleged implied warranty has thus been a matter of discussion and negotiation, and a compromise settlement has been reached, and the parties have continued under the old contract, and then have made a further elaborate written contract with reference to additional rights in this same matter for additional compensation, and all without any expressed covenant or warranty, the continuance of the implied warranty is not affirmed by any precedent brought to our attention, or, as we think, by any principle involved. The situation is, in all respects, analogous to that existing where an article is sold subject to acceptance, and, after trial for the special purpose desired, is accepted and paid for, or where there are express representations as to quality, and, after knowledge of their falsity, payment is made without objection. In neither of these cases is there any remaining liability upon an implied warranty of fitness. Kellogg Co. v. Hamilton, 110 U. S. 108, 112, 3 Sup. Ct. 537, 28 L. Ed. 86; Taylor v. Bank (C. C. A. 6) 212 Fed. 898, 129 C. C. A. 418; Kansas City Co. v. Rodd (C. C. A. 6) 220 Fed. 750, 754, 136 C. C. A. 356; Marmet Co. v. People's Co. (C. C. A. 6) 226 Fed. 646, 651, 141 C. C. A. 402.

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[2, 3] In order to demonstrate the correctness of the ruling of the trial court to the effect that the proof offered by defendant did not tend to establish a total failure of consideration, it is necessary to state only one reason. The other reasons urged may be passed by. The thing purchased here was an exclusive license under a patent. There is no claim, in the pleadings or in the offer of proof, that the patent was void. In view of the well-known distinction between that lack of patentable utility which makes a patent void and that lack of commercial utility which makes its exploitation not profitable until sufficient capital and skill are employed, or until market conditions are favorable, or until some improvements and refinements are discovered, and in view of the fact that defendant's counsel did not directly suggest the question of validity, we cannot accept the rather vague offer to show that the patented process was worthless to this company, or that this company was unable to make it work, as intended to present the issue of invalidity, and so we are not concerned with the reasoning or with the decisions upon that subject. As is familiar, and as we have had occasion to say, a patent is not inherently a grant of the right to make; it is a grant of the right to exclude others from the field. Swindell v. Youngstown Co., 230 Fed. 438, 442, 144 C. C. A. 580. By this exclusive license, as enlarged in May, the Veneer Company obtained, for the term of the patents, the right to exclude all its competitors from using this patented process, either in the form disclosed in the patent or by any improvement thereon which might be made by the patentees, or by any infringing improvement which might be made by others. The first claim of the patent is:

"A process for treating pieces of sap-containing wood, which consists in subjecting such pieces to the action of a bleaching gas-liberating solution acting to dissolve the sap, whereby decoloration and sap extraction are simultaneously effected."

This is, obviously, a broad claim. It is accompanied by 10 other claims, each in more or less broad and inclusive language. The proposition that the grant of exclusive rights for the United States and Canada under such a (valid) patent, which seems to control a considerable field of development and improvement for 17 years and to make tributary to it all improvements within the field, and the grant of similar rights in any improvements the patentees may make, do not constitute any consideration whatever for a promise to pay therefor, is a proposition which we think needs only to be stated to show its error.

We do not intend now to decide that the Veneer Company has no suitable remedy or defense, as against continuing or further asserted liability, if the patent is in truth void, because not involving patentable utility, or because it does not sufficiently disclose how to practice the process effectively. Neither the right to such remedy or defense, nor the effect thereon of the judgment in this case, is before us; but, upon the issues made and tried in this case, it was rightly held that the attempted defense failed.

The judgment is affirmed.

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(259 Fed. 270)

FARMERS' HANDY WAGON CO. v. BEAVER SILO & BOX MFG. CO.

(Circuit Court of Appeals, Seventh Circuit. March 5, 1919. Rehearing Denied April 4, 1919.)

No. 2653.

1. PATENTS ⟹312(2)—ACCOUNTING FOR INFRINGEMENT—EVIDENCE OF ROYALTIES.

In an accounting for infringement of patent, in determining what is a reasonable royalty for infringing sales, evidence of royalty on another patent would have no bearing.

2. PATENTS ⟹318(1)—ACCOUNTING FOR INFRINGEMENT—DAMAGES.

To entitle a complainant to recover damages from an infringer, when there is no evidence of an established or a reasonable royalty, it must show that it would probably have made the sales made by defendant but for the infringement, and the profits it would have made thereon.

3. PATENTS ⟹318(6)—ACCOUNTING FOR INFRINGEMENT—PROFITS.

Where the net profits made by the manufacture of an infringing article are shown, but such articles also infringed another patent, for which defendant was compelled to pay, a reasonable royalty for the use of the latter patent, the burden of showing which is on defendant, should be deducted, and the remaining profits are recoverable by complainant.

Appeal from the District Court of the United States for the Eastern District of Wisconsin.

Suit in equity by the Farmers' Handy Wagon Company against the Beaver Silo & Box Manufacturing Company. From a final decree on accounting for infringement, complainant appeals. Reversed.

Wallace R. Lane and George Mankle, both of Chicago, Ill., for appellant.

John E. Stryker, of St. Paul, Minn., for appellee.

Before BAKER, MACK, and EVANS, Circuit Judges.

MACK, Circuit Judge. The McClure patent, No. 814,067, for an improvement in silos, was sustained and held infringed by this court, reversing a decree of the District Court. 236 Fed. 731, 150 C. C. A. 63.

On the accounting that followed, the master found that defendant had sold 363 of the infringing silos; that on the basis of a reasonable royalty, the evidence bearing on which, however, was not deemed by him to be strong, a recovery of $3,630 should be allowed. He recommended, however, an alternative recovery of $3,760 based upon profits earned by the defendant as evidenced by a dividend declared January 1, 1912, on the business of 1911, the year of the infringement. The dividend was $4,000, but the testimony showed that 6 per cent. of the defendant's plant was used in the box business. The sum allowed was therefore fixed at 94 per cent. of the dividend.

On exceptions, the matter was re-referred to the master on one point, the application of $4,000 paid by the defendant in 1915, under a contract, in settlement of an infringement suit based on the Harder patent, No. 627,732. On the re-reference, additional testimony was taken. The master thereupon found that testimony to the effect that, of the $4,000 paid in the settlement, $3,630 was as a license fee for the 363 silos involved both in the Harder suit and in the present suit, must be rejected, on the ground that it varied the written instrument.

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He held, however, that, while it is immaterial how the parties to the contract divided the $4,000, it was material to ascertain whether, at the time the infringing silos were made, the defendant was under a liability to pay a royalty, and, if so, in what amount, because of the Harder patent. He further found that $10 per silo was the license fee for the Harder patent during the period in question, and therefore allowed that sum. His recommendation that plaintiff recover nominal damages only was sustained by the court.

Plaintiff urges a reversal of this decree, claiming both damages suffered by it, and the full profits, without deduction on account of the payment made in the Harder suit settlement.

[1, 2] 1. As to damages:

(a) While there is evidence that plaintiff refused to grant a license for the McClure patent for less than $10 royalty per silo, and that negotiations were pending with one party for such license, this evidence relates solely to a time subsequent to the adjudication of validity and infringement in this court, and long subsequent to the sale of the 363 silos in question. The record is bare of any evidence either of an established or of a reasonable royalty price at the time of the infringing sales. Even if the evidence sustained a finding of $10 or any other sums as a reasonable royalty under the Harder patent, it could have no bearing upon the reasonable royalty under the patent in suit.

(b) Equally bare is the record of any proof of damage suffered by plaintiff through these competitive sales. The mere sale by defendant is not sufficient; there is no proof that plaintiff would probably have been able to make these sales, but for defendant's wrongful competition; even that, however would not suffice. Plaintiff must have gone further, and proved that such sales, if made, would have been profitable. Its lost profits would then have afforded a measure of damages. No such proof was offered.

It follows, therefore, that an award of damages was properly denied.

[3] 2. As to profits: Otherwise, however, as to profits earned by defendant through these infringing sales.

(a) Proof that a dividend of $4,000 was declared in January, 1912, is prima facie proof of profits earned to that extent; in the absence of evidence to the contrary, they were properly apportioned, as between the silo and box branches of the business, in the proportions of 94 per cent. and 6 per cent.

(b) While the plaintiff is entitled to recover only so much of the profits as is attributable to the use of the McClure patent, yet if it appears upon the whole evidence that an accurate or approximate apportionment is impossible, the defendant as wrongdoer must suffer the loss. Proof that the defendant continued in the silo business, and sold a large number of noninfringing silos in subsequent years, affords no basis for such apportionment, in the absence of a showing that the subsequent sales likewise resulted in a profit.

(c) But it is clear in this case that, in figuring the profits based upon the dividends, no allowance was made for the use of the Harder patent, because in the year 1911 the defendant had paid nothing therefor. Inasmuch, however, as the defendant infringed the Harder pat-

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ent, as was subsequently established, and inasmuch as at least some portion of the $4,000 subsequently paid was a payment on account of such infringement, and inasmuch as the Harder patent was the basic patent, to use which the plaintiff, among others, was licensed, it is clear that some deduction for royalty for the use of the Harder patent ought to be allowed to the defendant, as a proper manufacturing cost to be charged against the profits.

We concur in the conclusion of the master that the actual amount so apportioned in 1915 by the parties to the Harder patent infringement suit is in no manner binding as between the parties to this suit. The allowance to be made to the defendant is a reasonable royalty charge, as of the year 1911, not exceeding in any event the sum actually paid in 1915. The evidence establishes that at least four parties had been given a license under the Harder patent for lump sums, and that their actual royalties per silo amounted to $1 or less. It further appears, however, that other parties were licensed at $10 per silo. No general or universal royalty basis existed in 1911.

The burden is upon the defendant to establish what a reasonable royalty would be, and we are not satisfied, upon the entire evidence, that it has succeeded in this to an extent greater than $5 per silo. Inasmuch as at least this amount may be deemed to have been paid on account of the infringement of the Harder patent, our conclusion is that from the profits of $3,760 there should be deducted the sum of $1,815 as fair royalty fee for the use of the Harder patent, and that a decree should be entered for the difference of $1,845, with interest at the rate of 6 per cent. per annum from and after March 19, 1918, and costs in the entire proceedings.

The decree will be reversed, and the cause remanded, with directions to enter a decree in accordance herewith.

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(259 Fed. 273)

SUPERIOR MACH. TOOL CO. v. CINCINNATI LATHE & TOOL CO.

(Circuit Court of Appeals, Seventh Circuit. March 12, 1919. Rehearing Denied May 6, 1919.)

No. 2649.

1. PATENTS ⟹328—VALIDITY AND INFRINGEMENT—FEED GEARING.
The Perrine patent, No. 1,029,313, for a feed gearing for use on lathes, *held* valid and infringed.

2. PATENTS ⟹16—INVENTION—MEASURE OF ADVANCE IN THE ART.
Invention cannot be made to depend upon the length of the advancing step in the art: but if the step be an advance, and the means by which the advance is made are new and beyond the conception of a mechanic trained in the art, invention must be recognized.

Appeal from the District Court of the United States for the District of Indiana.

Suit in equity by the Cincinnati Lathe & Tool Company against the Superior Machine Tool Company, to enjoin further infringement of patent to John R. Perrine, No. 1,029,313, covering feed gearing. Decree for complainant, and defendant appeals. Affirmed.

V. H. Lockwood, of Indianapolis, Ind., and Conrad Wolf, of Kokomo, Ind., for appellant.

William R. Wood, of Cincinnati, Ohio, for appellee.

Before BAKER and EVANS, Circuit Judges, and ENGLISH, District Judge.

EVANS, Circuit Judge. [1] The only defense to appellee's suit on its patent is invalidity; infringement being conceded, if the patent be sustained. "The invention pertains to feed gearings, such as are employed on lathes for securing various rates of carriage advance in feeding and in screw cutting, and the invention relates to improvements designed to facilitate the convenient getting of a certain number of speed changes for the lead screw and the feed rod." So read the specifications. The single claim reads:

"Feed gearing comprising, a first countershaft, means for imparting selective speeds of rotation to said shaft, four diversely sized gear fast on said first countershaft, a second countershaft, a pair of diversely sized gears loose on said second countershaft and engaging the outer ones of the gears on the first countershaft, a spool structure splined on the second countershaft, gears carried by the spool structure and adapted to engage with the inner gears on the first countershaft, clutches at the hubs of the loose gears on the second countershaft and at the hubs of the gears carried by this spool structure, a long pinion fast on the second countershaft, a driven shaft, a narrow gear fast on said driven shaft, a second driven shaft, a narrow gear fast on the said second driven shaft and at some distance from the gear on the first driven shaft, a slidable narrow gear constantly engaging the long pinion and adapted to slide along the same so as to be in mesh with either the gear on the first or the gear on the second driven shaft or be in disengaged position be-

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tween those two gears, and a handle mechanism for sliding said slidable gear, combined substantially as set forth."

While lathes are not mentioned, it is obvious that the "feed gearing" apparatus was designed for use on lathes. The so-called "quick change gear mechanisms" are desirable as they save time and increase output. The larger the number of speeds, the more adaptable the machine. The variations in speed are obtained by use of two countershafts upon which there are 12 gears, 4 on the upper and 8 on the lower countershaft or cone. In the Flather patent, No. 810,634, probably the closest prior art citation, the upper countershaft has three gears while the lower one has nine. Flather gets 27 speeds while appellant secures 32.

But it is not the number of speeds alone that describe the merits of the machine. Lathes of this character serve a double purpose. The operator may be called upon to cut screw threads on metal pieces, or he may use it simply to produce cylindrical surfaces. The machine covered by the patent provides a very simple and compact mechanism by which the required speed changes are easily and rapidly made. In appellee's machine there is one wide faced gear which must receive any one of the 32 speeds. This wide faced gear always meshes with a smaller faced sliding gear which therefore receives each of the 32 speed changes. While always rotating, it may be put into neutral, or can be adjusted to the screw or to the rod, with but a very slight sliding movement. In other words, by means of this intermediate sliding gear always responding to the rate of speed determined by the position of the gears on the countershaft the operator may drive either the lead screw or the feed rod, but, of course, never both at the same time, or he may so locate the sliding gear that it will be in neutral—that is, drive neither the lead screw nor the feed rod. This mechanism, conveniently located at the right-hand side of the lathe, with the feed screw and rod close together, permits the operator easily and handily to avail himself of the 32 speed changes, and it is found in such a combination in no other lathe to which our attention has been called.

[2] But it is claimed that neither the increase in the number of speeds nor the mere location of the operating means by which the change in speeds can be very easily accomplished marks invention but is a mere exercise of mechanical skill. It must be admitted that patentee took no giant's stride in perfecting this machine. On the other hand, invention cannot be made to depend upon the length of the advancing step. If the step be an advance, and the means by which the advance is made are new and beyond the conception of a mechanic trained in the art, we must recognize invention. If patentee's contribution was limited merely to an increase in the number of speeds obtained, we would hardly be justified in finding invention therefrom. But when to the increased number of speeds is added a handy, compact means for securing the use of these speeds, which according to certain testimony gave greater strength and endurance to the machine, invention appears.

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It is hardly conceivable that a patent so narrow and so limited should be infringed, were there no patentable novelty residing therein. The presumption in favor of patentability arising from the grant, strengthened as it is in this case by the conclusion of the trial judge, has not in our opinion been overcome.

The decree is affirmed.

(250 Fed. 275)

BISIGHT CO. et al. v. ONEPIECE BIFOCAL LENS CO.

(Circuit Court of Appeals, Fourth Circuit. January 20, 1919.)

No. 1627.

1. PATENTS ⚷167(1)—VALIDITY OF CLAIM—LIMITATION.
A patent claim may be limited by reference to the specifications.

2. PATENTS ⚷328—VALIDITY—BIFOCAL LENS.
The Connor machine patent, No. 836,486, claim 1, for making bifocal lenses, as limited by its reference to the specifications, is not invalid because too broad.

3. PATENTS ⚷328—INFRINGEMENT—MAKING BIFOCAL LENS.
The Connor machine patent, No. 836,486, claim 1, for making bifocal lenses, *held* infringed.

4. PATENTS ⚷328—VALIDITY—ANTICIPATION.
The Connor machine patent, No. 836,486, claim 1, for producing bifocal lenses, is not anticipated by grinding machines in remote arts, such as grinding buttons, since more than mechanical skill was required to apply the grinding process to lenses.

Cross-Appeals from the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge.

Suit by the Onepiece Bifocal Lens Company against the Bisight Company and Benjamin Mayer. Decree for complainant (246 Fed. 450), and defendants appeal, with cross-appeal by complainant. Decree modified.

Victor D. Borst, of New York City (William M. Stockbridge, of New York City, and Cyrus N. Anderson, of Philadelphia, Pa., on the brief), for appellants and cross-appellees.

V. H. Lockwood, of Indianapolis, Ind., and Edward Rector, of Chicago, Ill., for appellee and cross-appellant.

Before KNAPP and WOODS, Circuit Judges, and McDOWELL, District Judge.

WOODS, Circuit Judge. Consideration of the claims, infringements, and defenses set up in these appeals involve very fine distinctions of the application of the patent law to bifocal lenses. Study of the record and arguments satisfies us that the District Judge reached just conclusions as to most of the matters in controversy, and no good end would be attained by a statement of our reasons for approving his conclusions. 246 Fed. 450.

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[1, 2] We think, however, that the District Court was in error in holding invalid claim 1 of the Connor machine patent, No. 836,486. That claim reads as follows:

"Apparatus for producing bifocal lenses including a rotary holder for the lens crystal, and means for grinding two bifocal surfaces of different dioptrics simultaneously on one face thereof, substantially as set forth."

The District Court held this claim invalid, because the rotary lens holder is old in the art and the claim was too broad, in that it covered all apparatus which will make the product described, provided only that a rotary lens holder forms a part of them. A claim may be limited by reference to the specifications in the application. Seymour v. Osborne, 11 Wall. 516–547, 20 L. Ed. 33; The Corn-Planter Patent, 23 Wall. 181–218, 23 L. Ed. 161. We think the broad claim is so limited in this instance by the words "substantially as set forth," referring to the specifications in the application which it is conceded describe the apparatus, and that the claim is therefore valid.

[3] We are of opinion, also, that the defendant has infringed. It is true that in Connor's specifications he describes "a crystal holder member, and rotary grinding member co-operating therewith and having a spherically disposed grinding surface and an adjacent nonspherically disposed grinding surface," and that Mayer's machine, which the defendants operate, has both surfaces spherical. Connor's apparatus being the first to accomplish the desired end, or at least an important generic invention, should not be so narrowly construed as to permit real infringement by a variation which, if substantial, is merely an inferior application of Connor's invention. Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U. S. 405, 28 Sup. Ct. 748, 52 L. Ed. 1122; King Ax Co. et al. v. Hubbard, 97 Fed. 795, 38 C. C. A. 423.

[4] Connor's invention cannot be regarded anticipated by grinding machines in a remote art, such as the grinding of buttons. Evidently something more than mechanical skill was required to apply the grinding process to lenses, even if it had been suggested by the apparatus for grinding buttons. Hobbs v. Beach, 180 U. S. 383–392, 21 Sup. Ct. 409, 45 L. Ed. 586. The decree of the District Court, with this modification, protects the plaintiff in the exclusive use of all inventions covered by its patents, and meets fully the justice of the case. The decree of the District Court is modified accordingly.

Modified.

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(259 Fed. 369)

THE CARLO POMA.*

(Circuit Court of Appeals, Second Circuit. May 14, 1919.)

No. 234.

INTERNATIONAL LAW ⟹10—ADMIRALTY—JURISDICTION IN REM—VESSELS OF FOREIGN SOVEREIGN.

A vessel owned and operated by a foreign sovereign is exempt from seizure on process in rem from an admiralty court of the United States.

Appeal from the District Court of the United States for the Southern District of New York.

Suit by Guiseppe Cavallaro against the steamship Carlo Poma; the Kingdom of Italy, claimant. From an order staying execution of process, libelant appeals. Affirmed.

Harrington, Bigham & Englar, of New York City (D. Roger Englar, of New York City, of counsel), for appellant.

Burlingham, Veeder, Masten & Fearey, of New York City (Van Vechten Veeder, of New York City, of counsel), for the Carlo Poma.

Before WARD, ROGERS, and MANTON, Circuit Judges.

WARD, Circuit Judge. This is a libel filed against the Italian steamer Carlo Poma by Cavallaro, the shipper of 10,712 boxes of lemons from Messina to New York, delivered in a damaged condition, owing as alleged to negligence in loading, stowage, custody, and care, as well as to unseaworthiness of the steamer.

The Italian Ambassador suggested to the court:

"Count V. Macchi Di Cellere, Ambassador of the Kingdom of Italy to the United States of America, through Burlingham, Veeder, Masten & Fearey, proctors appearing specially for the Italian Steamship Carlo Poma, respectfully suggests to the District Court of the United States for the ——— District of New York, that said steamship Carlo Poma at all the times mentioned in the libel was, and now is, owned by the government of the Kingdom of Italy, being registered in the name of the Italian State Railways, a branch of said government, and in the possession of the government of the Kingdom of Italy, in the person of a master employed and paid by said government, and wholly manned and operated by a crew employed and paid by said government, which said steamship is to transport back to Italy a cargo belonging to the government of the Kingdom of Italy.

"Wherefore, it is respectfully suggested and prayed that said steamship be released from any seizure made and declared immune from process.

"Done at the Embassy of the Kingdom of Italy. Washington, D. C., September ——, 1918.

"[Seal Italian Embassy.] Macchi Di Cellere."

This suggestion was accompanied by the following certificate from the Secretary of State:

"To All to Whom These Presents shall Come—Greeting:

"I certify that Count V. Macchi Di Cellere, whose name is subscribed to the paper hereto annexed, is duly accredited to this government as Ambassador Extraordinary and Plenipotentiary from the Kingdom of Italy.

"In testimony whereof, I, Robert Lansing, Secretary of State, have hereunto caused the Seal of the Department of State to be affixed and my name

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*Certiorari granted 250 U. S. 656, 40 Sup. Ct. 14, 64 L. Ed. —.

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subscribed by the chief clerk of the said department, at the city of Washington this 26th day of September, 1918.

"[Seal.] Robert Lansing, Secretary of State.

"By Ben. G. Davis, Chief Clerk.

"For the contents of the annexed document the department assumes no responsibility."

Proctors for the Kingdom of Italy, appearing specially, moved for an order staying the execution of process. This is an appeal from the order of Judge Hough granting the motion.

That the suggestion was sufficient proof of the statements contained in it is not seriously contested. We accept it as verity.

We are concerned in this case only with property of a foreign sovereign. The appellant contends that a vessel of a foreign sovereign not being a war vessel or at the time performing public duties but engaged in carrying cargo commercially is not entitled to immunity from suit. The English courts go the whole way in refusing process against property of a foreign sovereign under any circumstances. This because of the international comity due from one sovereign to another. The Parlement Belge, Law Reports, 5 P. D. 197; The Jassy (1906) P. 270.

The law of the United States is the same, except that the immunity of property of a sovereign, whether the United States or a foreign sovereign, depends, not merely upon the ownership, but also upon the actual possession by the sovereign of the property at the time process is served. The Davis, 10 Wall. 15, 19 L. Ed. 875; Long v. The Tampico (D. C.) 16 Fed. 491; The Attualita, 238 Fed. 909, 152 C. C. A. 43.

This general rule of law is not affected by the consideration suggested by the appellant that the United States has by section 9 of the United States Shipping Act of September 7, 1916, c. 451, 39 Stat. 730 (Comp. St. § 8146e), provided:

"* * * Every vessel purchased, chartered, or leased from the board shall, unless otherwise authorized by the board, be operated only under such registry or enrollment and license. Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein. * * *"

The vessels referred to are such as are operated, not by the government, but by persons who have "purchased or leased or chartered" them from the government. The language of section 11 (Comp. St. § 8146f) confirms this view:

"Sec. 11. That the board, if in its judgment such action is necessary to carry out the purposes of this act, may form under the laws of the District of Columbia one or more corporations for the purchase, construction, equipment, lease, charter, maintenance, and operation of merchant vessels in the commerce of the United States. * * * The board, with the approval of the President, may sell any or all of the stock of the United States in such corporation, but at no time shall it be a minority stockholder therein: Provided, that no corporation in which the United States is a stockholder, formed under the authority of this section, shall engage in the operation of any vessel constructed, purchased, leased, chartered, or transferred under the authority of this act unless the board shall be unable, after a bona fide effort, to contract with any person a citizen of the United States for the purchase, lease, or

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charter of such vessel under such terms and conditions as may be prescribed by the board."

Process against such vessels would not disturb the possession of the government.

It follows from these principles that the order appealed from was right. Similar conclusions have been reached by district judges in this circuit. Judge Veeder in the case of The Pampa (D. C.) 245 Fed. 137; Judge Mayer in the case of The Maipo (D. C.) 252 Fed. 627; and Judge Hough as to the same steamer, February 21, 1919.

The order is affirmed.

(259 Fed. 371)

BYRON v. UNITED STATES.*

(Circuit Court of Appeals, Ninth Circuit. July 7, 1919.)

No. 3246.

1. POST OFFICE ⟹48(4)—USE OF MAILS TO DEFRAUD—INDICTMENT.
   That allegations, in an indictment, show that representations made by defendants to persons whom they sought to defraud by means of a scheme carried out by use of the mails were inconsistent with each other, does not render the indictment bad.

2. POST OFFICE ⟹35, 49—USING MAILS TO DEFRAUD—EVIDENCE.
   On trial of a defendant for using the mails to defraud by inducing persons to make application through him to purchase public lands under the Timber and Stone Act, evidence that he represented that certain things were not necessary to obtain a patent which were required by the rules of the land office, of which applicants were not told, was admissible, and the representations cannot be justified on the ground that such rules were invalid.

3. CRIMINAL LAW ⟹371(1)—OTHER OFFENSES—INTENT—USE OF MAILS TO DEFRAUD—EVIDENCE.
   On the trial of a defendant for using the mails in carrying out a scheme to defraud, evidence that he had previously defrauded other persons by means of a similar scheme was admissible, where limited to the question of intent.

4. PUBLIC LANDS ⟹120—WOODS AND FORESTS ⟹8—EFFECT OF CANCELLATION OF PATENTS—FOREST RESERVES.
   On cancellation of patents to public lands for fraud, the legal title becomes reinvested in the United States, where the equitable title remained, as of the date of the patents, and the land at once becomes subject to a prior act including it within the limits of a forest reserve.

5. WOODS AND FORESTS ⟹8—TEMPORARY WITHDRAWAL FROM SETTLEMENT OR SALE—FOREST RESERVES.
   The authority given the President by Act June 25, 1910, § 1 (Comp. St. § 4523), to temporarily withdraw public lands from settlement or sale, includes such withdrawals for the purpose of including the land in a national forest.

In Error to the District Court of the United States for the District of Oregon; Charles E. Wolverton, Judge.

Criminal prosecution by the United States against Carlos L. Byron. Judgment of conviction, and defendant brings error. Affirmed.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Rehearing denied October 14, 1919.

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P. V. Davis and E. M. Comyns, both of Seattle, Wash., for plaintiff in error.

B. E. Haney, U. S. Atty., and John J. Beckman, Asst. U. S. Atty., both of Portland, Or.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. Byron and Alley were indicted jointly for having devised a scheme to defraud and used the mails in furtherance of the scheme, in violation of section 215 of the Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1130 [Comp. St. § 10385]). Alley was not apprehended, but Byron was tried and convicted under the five counts included within the indictment. He brought writ of error.

The scheme charged was as follows: The defendants, for the purpose of defrauding certain persons named and others unknown, and the public generally, called "victims," would fraudulently represent that they could procure for them patents and titles to certain lands in Oregon called "selected lands" and "patented lands," if the "victims" would pay to defendants certain moneys as location fees and expenses. Defendants had been successfully engaged in procuring, for applicants, title to such "patented' and "selected" lands located in Oregon, having great value for timber thereon, by means of a procedure substantially as follows: It would be represented that the lands designated as "selected" were in the Roseburg, Oregon land district and had previously been selected by Hyde & Co. and one Kribs and other transferees under the Forest Lieu Selection Act of Congress of June 4, 1897, c. 2, 30 Stat. 11, 36 (Comp. St. §§ 5123–5134); that the manner by which the title to the base lands offered to the selector had been acquired was unlawful, and adverse proceedings were pending in the Land Department seeking to cancel the selection on the ground of fraud; that the result of such adverse proceedings would be the cancellation of all selections; that there were large tracts of other lands, designated as "patented," which were lands to which patents from the United States had previously been fraudulently obtained; and that the lands had been restored to the public domain by reason of a decision of the Supreme Court in certain equity suits wherein the United States was plaintiff, and the Linn & Lane Timber Company and others were defendants. The following misrepresentations were to be used with respect to these matters: That the "selected" and "patented" lands were open to patent and sale under the Timber and Stone Act June 3, 1878, c. 151, 20 Stat. 89. That those who filed through defendants' agency on such lands would receive patent and title within two years from the date of application. That persons who would make application for such lands through defendants would, by such applications and services to be rendered by defendants, obtain preference rights to purchase from the government at $2.50 per acre. That in order to get title to said lands it was necessary and proper to file applications in the Roseburg Land Office, and preference rights to purchase would be secured. That the United States asked $2.50 per acre and no more. That personal examination by

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the applicant of lands applied for under the Timber and Stone Act prior to the filing of an application was not necessary. That, by reason of the services to be furnished by defendants, application for lands filed under the guidance of defendants would be allowed by the officers of the Land Office, and upon payment of $2.50 per acre the government would issue patent within two years from the date of application. That applications filed under the direction of defendants would be the first in point of time filed in the Land Office for the tracts applied for. The defendants would require the "victims" to pay from $100 to $1,000 each for their pretended services for locating them, and would then defraud the "victims" out of all their money so received and give them nothing in return therefor. That to induce the "victims" defendants would agree to furnish the services necessary to secure patents and that in the event of failure they would refund the moneys paid. That defendants would, by reason of their knowledge of public land laws, cause a reversal and change of certain rules and decisions of the Land Office authorities in Washington, and in that way secure title to such lands for the "victims." That defendants would represent that many other persons were anxious to make application for and secure patent to the said lands through the agency of defendants. To carry out the scheme, defendants would use the mails transmitting applications, letters, patents, notices of appeal, and other documents.

The indictment negatives the several alleged false representations and pretenses by setting up that the defendants never had succeeded in securing title for any one for either the said "selected" or "patented" lands by means of their procedure or otherwise; that the procedure was worthless; that it was impossible to initiate or secure preferences for the lands; that neither the "selected" nor "patented" lands were open to sale, selection, or entry under any of the public land laws of the United States, and applications for the same would be rejected; that the lands could not be purchased under the Timber and Stone Act for $2.50 per acre, and if open to entry could only be procured by payment of the appraised value thereof; that patent could not be secured for any lands under the Timber and Stone Act unless the applicant personally examined the land applied for within 30 days prior to filing the application; that every application filed would be rejected by the Land Office; that upon various tracts upon which the "victims" might file there had already been similar applications to purchase said lands, filed by others whose filings were prior; that defendants never intended to repay the moneys paid by the "victims"; and that any agreements for the return of moneys were made to induce the "victims" to believe that their money would be returned and to prevent them from discovering that they had been cheated and defrauded.

[1] It is said the indictment is fatally defective because of inconsistency between certain averments of the numerous representations made by defendants in furtherance of the scheme charged, in that the allegation that defendants would represent that, by reason of their pretended services, applications to purchase under the Timber and Stone Act would be accepted and allowed by the Land Office, is

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contradicted by another allegation to the effect that defendants would represent that they could, by reason of their knowledge of the public land laws, cause a reversal and change of certain rules and regulations of the United States land authorities and the Department of the Interior, and in that way secure title to the lands.

In the scheme charged there may have been some seeming or real inconsistencies. Certain of the alleged misrepresentations would be used by the defendants in persuading one of the "victims" who might be defrauded, while others would be made to another; yet, if the scheme was as pleaded, the indictment was sufficient. That seems too plain for discussion.

It is said that the court erred in admitting testimony of a witness to the effect that Byron told him there were about ten million feet of timber on the land the witness applied for, and that, acting under the advice of Byron, witness had stated in his application that the land contained but one million feet. We see no error in the ruling. If the applicant in good faith relied upon and believed Byron's representation and did what Byron told him was necessary to acquire title, the competency of the evidence is not affected by the fact that the applicant endeavored to deceive the land officers of the government.

[2] It is earnestly argued that a personal examination of the land by an applicant previous to filing was not necessary, and that the Land Office regulations which require that the applicant shall personally examine the land previous to filing are contrary to law, and that therefore it was error to admit evidence that Byron had advised applicants that it would not be necessary for them to visit the land before filing. The view of the District Court was embodied in an instruction to this effect: That the Land Department by rule required that the applicant should personally inspect the land before filing; that the enforcement of the rule by the Land Department was a matter within its own control and was binding upon applicants until revoked or annulled, "so that a representation that it is not necessary for the applicant personally to inspect the land within 30 days previous to filing is not true because the Land Department does not require it." It is to be remembered that the defendants, in executing the scheme charged, would induce the "victims" to believe that by filing upon the lands they would obtain a preference to obtain patent by paying $2.50 per acre to the government, the applicants also understanding that they were to obtain patents from the Land Office. Byron never informed them that the regulations with respect to personal inspection before filing was, in his opinion, in excess of the authority of the Land Department; nor did he tell them that unless regulations made by the Land Office were complied with the applications would be rejected. On the contrary, the applicants said that they paid Byron on the assumption that they would obtain patents, and it follows, we think, that if his representations with respect to inspection and price per acre were false and made with a view to have the applicants pay him the moneys which he obtained from them, and were acted upon, this evidence was competent and relevant, notwithstanding any possible question as to the validity of the rule of the Land Department. Durland v. United States, 161 U.

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S. 306, 16 Sup. Ct. 508, 40 L. Ed. 709; Ness v. Fisher, 223 U. S. 683, 32 Sup. Ct. 356, 56 L. Ed. 610.

[3] The plaintiff in error objected to evidence that another similar plan was carried out by defendants where applicants for lands in 1914, 1915, and 1916, had paid money to Byron and had not been repaid. This evidence was admitted by the court solely for the purpose of aiding the jury in ascertaining the intent of the defendants in their conduct in the case on trial. For that purpose and under such limitations, it was competent. Riddell v. United States, 244 Fed. 695, 157 C. C. A. 143; Hallowell v. United States (D. C.) 253 Fed. 865.

By regulation of the General Land Office (1908), an appraisal of lands subject to entry under the Timber and Stone Act was made and a minimum of $2.50 per acre fixed as the sale price. Witnesses testified that Byron gave them to believe that the lands could be had at $2.50 per acre. The regulation is said to be invalid and therefore that such evidence was improperly admitted. But the regulation was being enforced by the Land Office, and under the practice no patent could be had unless the price at which the land was appraised was paid, provided the appraisal was made within the time limited in the regulation. The District Court charged that the Land Department was enforcing the rule with respect to appraisement; that it controlled applications for the purchase of lands; and that a representation, if made, that the applicant could not be required to pay to exceed $2.50 an acre for the land, "is not true and not the law." Our opinion is that the question of the validity of the regulation was not directly in issue, for if the defendant believed that his view as to the invalidity of the regulation was sound, yet, if he knew of the rule and made the representations that he is charged to have made, intending to defraud the persons to whom he made such representations out of moneys which they would pay to him, and if he used the mails as charged, he would be guilty of a violation of the statute. Ness v. Fisher, supra; Virinda v. Vinson, 39 Land Dec. 449. The court, however, specially guarded defendants' rights by instructing that if Byron acted upon the advice of counsel, and if in good faith he sought legal advice and followed the same, he could not be convicted of crime, even though such legal advice were erroneous as to a true construction of the law.

[4] The situation with respect to the "patented" lands referred to in the indictment was as follows: In an equity suit entitled United States v. Linn & Lane Timber Company and C. A. Smith et al., brought in the United States court for Oregon in 1908, patents to certain lands were sought to be set aside. Decree of cancellation of the patents there involved was rendered in October, 1910, and the decree was affirmed by this court in May, 1912, and by the Supreme Court of the United States in March, 1915. Linn & Lane Timber Co. v. United States, 196 Fed. 593, 116 C. C. A. 267; Linn & Lane Timber Co. v. United States, 236 U. S. 574, 35 Sup. Ct. 440, 59 L. Ed. 725.

The Cascade National Forest was created by proclamation of March, 1907. The Santiam National Forest was created July 21, 1911, and included part of the Cascade National Forest. A portion of the lands involved in the equity suit heretofore referred to was within the ex-

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terior boundaries of the Cascade and Santiam Forest Reserves, and the remainder of the lands included in the equity suit were outside of the limits of the Santiam Forest but contiguous thereto. In August, 1912, by executive order, the last-mentioned class of lands was withdrawn. Certain applications filed for these lands within the exterior limits of the forest were made through the solicitation of Byron and were at first rejected because the Land Office had not been notified that the lands had been restored to the public domain and were open to entry. Holt v. Murphy, 207 U. S. 407, 28 Sup. Ct. 212, 52 L. Ed. 271. Thereafter on April 20, 1916, after the Department of the Interior had notified the local land office that the lands had been restored to the public domain and were not open to entry because they were included in the Santiam Forest, other applications were filed through Byron's activities, and they, too, were rejected because the lands were included within the forest reserve. Plaintiff in error takes the position that, because these lands were patented at the time of the creation of the Cascade and Santiam Forests, they never became part of such forests, and therefore that upon cancellation of such patents the lands were restored to the public domain and ought not to have been held not open to entry under the land laws. But it appears that the Department of the Interior took the view that, when cancellation of the outstanding legal title was effective, title which had been acquired by fraud was reacquired by the United States, and that such reacquired title related back to the date when the legal title was lost, and that the United States was revested with a perfect title, to be regarded as if it had not been interrupted. The principle followed by the Land Department was that an order of reservation operates upon the equitable as well as the legal rights of the United States in the land, and that, if the legal right is subsequently canceled, an order of reservation made while legal title was outstanding is effective, "for the complete title is merely reunited where the equitable title was all the time." In Bradford v. United States, 222 Fed. 258, 138 C. C. A. 69, in a suit affecting the validity of patents to certain public lands, the court said the decree of the court declared void, canceled, and annulled the patents that had been issued and the conveyances made thereunder and restored to and declared the land to be the property of the United States. "This cancellation has the effect of wiping out as though never existing the patents and conveyances in question."

[5] It is argued that it was error on the part of the District Court to hold that lands embraced in an order of withdrawal made by the executive could include certain lands which had been awarded to the United States by decree of the United States Circuit Court of Appeals pending disposition by Congress and legislation looking to the inclusion of the lands within a national forest. The temporary withdrawal order was made August 13, 1912, and the authority for the order was found in the Act of June 25, 1910, c. 421, 36 Stat. 847 (Comp. St. §§ 4523–4525), which authorized the President temporarily to withdraw from settlement, location, sale, or entry any of the public lands and reserve the same for water power sites, irrigation or classifications of lands, or other public purposes to be specified in the orders of withdrawal. We do not find that the power of the President is as limited

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as plaintiff in error argues it is, and in our opinion a temporary withdrawal, in order to include the land within a national forest, is within the general purposes contemplated by the statute. United States v. Midwest Oil Co., 236 U. S. 459, 35 Sup. Ct. 309, 59 L. Ed. 673. It is clear, under the record, that the Land Department held the lands called "patented" to be within the national forest and rejected the applications made through the instigation of Byron. Plaintiff in error well knew that, while the Land Department held the lands to be within a national forest, title could not be obtained; but, notwithstanding this knowledge, the evidence goes to show that Byron took money from the applicants with the intention of deceiving them and not refunding.

It is contended that the court erred in ruling that unapproved forest lieu selections, such as were involved upon the trial, operated to segregate the land selected from the general public domain, and that during the pendency of such selections other applications for the land selected would not be allowed. Again, in making such ruling the District Court was but recognizing the rule of the Land Office and the practice which has prevailed for many years. Santa Fé R. R. Co. v. California, 34 Land Dec. 12; O'Shee v. Coach, 33 Land Dec. 295. Of the practice Byron appears to have been fully cognizant, and, while there may have been some early decisions of the Land Department based upon a different practice, it is indisputable that the Land Department may make appropriate rules for the orderly administration of the public land laws, and under such power we believe the practice was not in excess of authority.

Error is assigned because the court made special reference to the testimony of a witness who was a member of the Board of Law Review of the General Land Office at Washington. This witness testified to certain practices of the Land Office with respect to contests and applications. A fair reading of the instruction complained of shows that the court did not mean to draw any invidious distinction between the testimony of the witness and that given by a witness for the defendant who testified as to his belief with respect to the consequences of filing by applicants upon certain public lands. The court indicated that it adopted the construction of the Land Office rule as testified to by the one witness, rather than that testified to by the other witness. We find no error in the course pursued.

There are in the many assignments references to some other points, but they are of less importance, and we find none of them well founded.

Judgment is affirmed.

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(259 Fed. 378)

GURINSKY v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. April 4, 1919. Rehearing Denied October 7, 1919.)

No. 3296.

1. CRIMINAL LAW ⟹400(4)—SECONDARY EVIDENCE OF WRITING—PAY ROLL.
The rule against secondary evidence of the contents of written instruments is less stringent, where the evidence is negative, as in the case of testimony that a certain column for signatures opposite 56 names on a pay roll was blank, than it is where the attempt is to reproduce orally the written language of an instrument, especially one that creates or disposes of rights.

2. CRIMINAL LAW ⟹1169(10)—HARMLESS ERROR—EVIDENCE—SECONDARY EVIDENCE—CONTENTS OF PAY ROLL.
In a prosecution for violation of Penal Code, § 47 (Comp. St. § 10214), by embezzling moneys of the United States while acting as paymaster's clerk, admission of evidence for the government that certain pay rolls, the originals of which were shown to be in the possession of the government at Washington, did not contain receipt signatures after the names of 56 employés, *held* not reversible error, in view of negative character of evidence.

3. CRIMINAL LAW ⟹723(5)—ARGUMENT OF COUNSEL.
Where the United States attorney in argument was permitted to characterize defendant, named Gurinsky, as a gambling Jew, against objection there was no evidence as to what race defendant belonged, it cannot be said that there was error; the name and circumstance of defendant's change of name having been some evidence of his race, while his appearance, accent, and demeanor may have been pertinent evidence.

4. EMBEZZLEMENT ⟹47—JURY CASE.
In a prosecution for violation of Penal Code, § 47 (Comp. St. § 10214), by embezzling moneys of the United States while acting as paymaster's clerk, where there was evidence tending to show there was a shortage in the pay roll money, and that defendant was accountable, the trial court could not have properly directed verdict.

In Error to the District Court of the United States for the Western District of Texas; Duval West, Judge.

Mike Gurinsky, alias Jack Green, was convicted of embezzling money of the United States while acting as paymaster's clerk, and brings error. Affirmed.

C. A. Davies, of San Antonio, Tex. (Chambers & Watson, of San Antonio, Tex., on the brief), for plaintiff in error.

Hugh R. Robertson, U. S. Atty., of San Antonio, Tex.

Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

GRUBB, District Judge. This is a writ of error from a judgment of conviction of the plaintiff in error for a violation of section 47 of the Penal Code of the United States (Act March 4, 1909, c. 321, 35 Stat. 1097 [Comp. St. § 10214]) by embezzling $3,360 of its moneys, while acting as paymaster's clerk in the office of the paymaster for the construction and repair division at Ft. Sam Houston, Tex.

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Three grounds for the reversal of the judgment are insisted upon. They are: (1) That the government was permitted to prove the contents of certain pay rolls, the original being shown to be in the possession of the government at Washington; (2) that the United States attorney was permitted in his address to the jury to characterize the defendant as a "gambling Jew," when, as contended, there was no evidence of his race or nationality; and (3) the refusal of the District Judge to direct an acquittal.

[1, 2] 1. The evidence tended to show that the money embezzled was that used in making up the pay rolls of employés at Leon Springs and Kelly Field and Travis camps. The defendant, together with the government witnesses, Wood and Nayer and Hopkins, made up the rolls for the first two weeks of the month of May, 1918. The method was to take the names of the employés from the foremen's field time books and enter them from them into what was called the service or consolidated time book, exactly as and in the order that they appeared in the foreman's time book. From the service book the names were entered alphabetically upon the pay rolls by one man calling them from the service book to another, who wrote them on a typewriter on the pay rolls. After the pay rolls were prepared, envelopes were made out in corresponding number and names, and the money was counted and put into the envelopes and sealed. The envelopes were kept in a basket. Identification numbers were placed on the pay envelopes. When the man had signed or made a mark opposite his name on the pay roll, he was given his pay envelope, and his receipt on the pay roll was a voucher for the amount disbursed to him. One of the foremen, whose time book was used in making up the May pay roll, was George Roberts. The defendant had secured his time book from him early in the morning and had transferred the names of the men and amounts due them from the time book to the office service book or consolidated time book, from which the pay rolls were made. He made the transfer in the pay office early in the morning before the other pay clerks had arrived there. The names in the service book, taken from Roberts' time book, were in defendant's handwriting, as were also 60 names not found in Roberts' time book when it was put in evidence. When shown the 60 names involved in the controversy, after the shortage was discovered, the defendant, upon inquiry as to where he got them, stated that they came from Roberts' book.

The evidence tended to show that the pay envelopes for 56 of the 60 names were missing from the basket, after the men had been paid off, and that there were no signatures of any of the men who bore the 56 names on the pay roll. Each pay envelope of the 56 contained $60, and the missing 56 aggregated $3,360, the amount of the shortage. The government proved the fact that the pay rolls did not contain signatures for the 56 names by the witness Hopkins, who had compared the 56 names on a list taken from the pay envelopes or service time book with the pay rolls, with that result. The original pay rolls were not introduced, though in the government's possession at Washington, and objection was made to Hopkins' evidence as to their contents, as being secondary evidence.

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The government had two propositions to establish: (1) The shortage; and (2) that defendant caused it. As to the fact of the shortage, the government did not rely alone upon the fact that the pay rolls were not receipted opposite the 56 names in question. Roberts testified that he had no men in his employ corresponding to the 56 names. His book showed no such names, and the absence of pages was accounted for and afforded no rational inference to the contrary. Inquiry failed to develop the presence of such employés in any of the camps within the paymaster's jurisdiction. The officer in charge was required to make good the shortage. The loss itself was established independently of Hopkins' evidence that the pay rolls were not receipted. This testimony as to the condition of the pay rolls did not reflect upon the question as to who caused the shortage, if there was one. If Hopkins had testified that there were signatures opposite the 56 names in defendant's handwriting, the case would have been presented differently. If the defendant contended that the rolls, if produced, would have shown 56 signatures on the pay rolls opposite the 56 names in a handwriting other than his, then it was his duty to require production of the rolls by the government, and, failing to do so, he has no complaint based on their absence.

It is also to be noted that Hopkins, in this respect, did not testify to what the pay rolls contained, and his testimony did not infringe the letter of the rule against the allowance of secondary evidence of the contents of a written instrument. He merely stated that the column for signatures opposite the 56 names was blank. The rule is less stringent, where the evidence is negative than where the attempt is to reproduce orally the written language of an instrument, especially one that creates or disposes of rights. The tendency of modern decisions and text-books is to relax the rule, and not to apply it to instruments only collaterally involved in the case. Greenleaf on Evidence (16th Ed.) p. 169.

Hopkins' evidence that the names from No. 575 to No. 635 on the service time book were put in alphabetical order on the pay roll and the items were all $60 items, was testified to in effect by the defendant himself. The defendant testified that he and another transferred the names from the service book to the pay rolls, and the 60 names were shown to be on the service book. According to the course of business, all names appearing on the service book were transferred from it to the pay rolls alphabetically. The important questions were whether the names were written on the service book by the defendant, and whether the pay envelopes had been prepared for them and were missing. Four of the 60 pay envelopes, for which there were no corresponding employés, were still in the basket at the time the loss of the others was discovered. The course of business was such that pay envelopes were prepared for all names that appeared on the service time book, and the 56 names involved did so appear. The evidence clearly shows that the course of business was followed on this occasion. We conclude that there was no reversible error in the District Court's ruling on the assignment based on Hopkins' evidence.

[3] 2. The plaintiff in error complains that the United States at-

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torney, in his argument to the jury, was permitted to characterize the defendant as a gambling Jew, against defendant's objection that—

"There was no evidence in the record as to what nationality or race the defendant belongs, and because the said reference and designation constituted a direct appeal to the prejudice and passion of the jury against the Jewish race."

The court admonished the United States attorney to confine himself to the record, but did nothing else. We are not concerned with the propriety of the comment. The ground of objection was solely that there was no evidence in the record of defendant's race. We think his original name and the circumstances of his change of name were some evidence of his race. His appearance, accent, and demeanor were before the District Court, and may have been physical evidence, tending to show his race, which the jury would have a right to consider.

[4] 3. There was evidence tending to show that there was a shortage in the amount of the pay roll money, put up in envelopes, and that the defendant was accountable for it, and the District Judge could not have properly directed an acquittal.

Finding no error in the record, the judgment is affirmed.

(259 Fed. 381)

INTERNATIONAL BANKING CORPORATION v. McGRAW TIRE & RUBBER CO. et al.

ROBERT MORRIS TRUST CO. v. SAME.

(Circuit Court of Appeals, Sixth Circuit. January 9, 1919.)

Nos. 3167, 3168.

1. PLEDGES ⟹44—PLEDGOR—RIGHTS OF.

A debtor, who has pledged nonnegotiable security, and who is not chargeable with notice that the creditor has parted with the security so pledged, may pay his debt to the creditor and thereby become entitled to the return of the security, and the risk is carried by a transferee thereof, who has not given notice of his rights thereto; but where the creditor has the right to repledge, and the original debtor is chargeable with notice that such retransfer has been made, if he pays without obtaining return of the property, he does so at the risk of being compelled to satisfy the claim of the second transferee.

2. PLEDGES ⟹44—PLEDGOR—NOTICE.

Where defendant, to obtain advances, assigned its accounts receivable to a broker, and the assignments gave the broker the right to repledge the accounts, *held*, that defendant was chargeable under the circumstances with notice that the broker had repledged the security, and it repaid the broker the amount of the advances, without procuring the assignments, at its peril.

3. PLEDGES ⟹44—REASSIGNMENT—EFFECT.

Though defendant's assignment of accounts receivable recited that it was contemplated that the pledgee might reassign the same as collateral security for a loan to defendant, and the pledgee reassigned the accounts, obtaining the loan himself and advancing the amount to defendant, *held* that, where defendant repaid the pledgee amount of the advances without

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obtaining a return of assignments or protecting banks which made the advances to the pledgee, the assignments should be treated as allowing the course of dealing pursued by the pledgee.

4. PLEDGES ⟹44—REASSIGNMENT—EFFECT.

Where defendant assigned accounts receivable to secure advances, and the assignments authorized repledge, the fact that defendant, as the accounts matured, made payments to its assignee, the pledgee, without receiving return of the assignments, etc., did not warrant defendant in paying the entire indebtedness to the pledgee without taking any steps to learn whether the accounts had been reassigned and protect those to whom the accounts may have been reassigned.

5. PRINCIPAL AND AGENT ⟹105(2)—AUTHORITY OF AGENT—IMPLICATIONS.

A broker, who borrowed from banks sums which he advanced to defendant, the loan being secured by defendant's pledge of accounts receivable, which he reassigned to the bank, *held* not to have implied authority to receive payment on behalf of the banks of the entire loan, which amounted to over $200,000, because the banks allowed him to receive payments of relatively small sums as the accounts fell due.

6. PLEDGES ⟹42—PLEDGER—NOTICE.

Where defendant, to obtain advances, assigned its accounts receivable to a broker, who, as authorized, reassigned them to banks, *held* that, as the assignments contemplated such retransfer, the banks were not bound to give notice to defendant of their rights.

Appeals from the District Court of the United States for the Eastern Division of the Northern District of Ohio; D. C. Westenhaver, Judge.

Bill by the International Banking Corporation against the McGraw Tire & Rubber Company and others, together with a bill by the Robert Morris Trust Company against the same defendants. From decrees dismissing the bills, complainants appeal; the appeals being consolidated. Decrees reversed and remanded, with directions.

The McGraw Tire & Rubber Company desired to borrow money. One Dockendorf, of New York, holding himself out as a banker, proposed to advance the desired funds upon the security of pledges of the McGraw Company's accounts receivable. An elaborate written contract, covering the details of this situation, was executed by both parties, and business under it was carried on for several years. Dockendorf borrowed money, some from the International Banking Corporation and some from the predecessor of the Robert Morris Trust Company (hereafter called the banks), and these funds he forwarded to the McGraw Company (hereafter called the defendant). In order to obtain such advances from Dockendorf, and acting in pursuance of the contract, the practice of the defendant was to take a copy of the invoice which it had sent to its customer, indorse thereon an assignment to Dockendorf, and send it to him. All these assignments of account were made upon a prepared form. The face of the form was headed: "Certificate of Indebtedness. Below is a true and correct copy of invoice rendered for goods sold and delivered." Upon the back was a formal assignment, with the stipulations hereafter mentioned, which was signed by the defendant. This certificate of indebtedness Dockendorf reassigned and pledged to the banks as security for the advances which the banks made, and which Dockendorf sent to defendant.

On April 10, 1914, the defendant determined to discontinue this method of business; an accounting with Dockendorf was had, and it was found that the advances unpaid to that date amounted to $207,216. This sum it paid Dockendorf, and took from him a blanket release of all indebtedness and reassignment of his interest in all accounts receivable which had been transferred to him. The banks did not participate in, nor have any knowledge of this settlement, and retained possession of all the certificates of indebtedness which

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Dockendorf had turned over to them. Defendant made no demand or effort looking to the getting in of any of these outstanding certificates. Thereafter, as each account receivable became due and within the agreed time thereafter, Dockendorf paid to the banks the amount of the advance which had been made upon the pledge of that account. This course of business he continued until early in July. He then suspended such payments, and never made any more. At that date the balance unpaid and owing to the banks was about $105,000 and interest. No part of this sum has been paid.

The main contract between defendant and Dockendorf provided that the assignments of the accounts receivable to be made from the McGraw Company to Dockendorf "shall be prepared in such form and shall include or be accompanied by such representations, guaranties, and agreements as the party of the second part [Dockendorf] shall from time to time direct." Each assignment so indorsed upon the "certificate of indebtedness" contained these provisions, among others:

"It is mutually agreed that the party of the second part [Dockendorf] shall have full power to reassign the accounts receivable, and that such accounts receivable shall be and remain the sole property of the party of the second part or his assigns, with unlimited authority to sell, assign, pledge, repledge, collect, compromise, compound, extend, or convert into bills receivable with or without security."

"The undersigned hereby constitutes and appoints said John E. Dockendorf his true and lawful attorney irrevocably for it and in its name and stead, but to his own use and benefit, to sell, assign, transfer, set over, pledge, compromise, or discharge the whole or any part of the aforesaid claim or account. * * * The undersigned, knowing that this account is to be reassigned by John E. Dockendorf to a financial institution or person, and is to be given to said financial institution or person as collateral security for a loan to be made to the undersigned, for the express purpose of inducing said institution or person, to which it may be assigned by John E. Dockendorf, to pay this money and to make the said loan to the undersigned, does hereby make the following representations to both John E. Dockendorf and the said financial institution or person: * * *. (5) That if any checks or money due on the acount hereby assigned shall at any time come to the undersigned, such checks or money shall be accepted by the undersigned as the property of the institution or person lending the money hereon and to be immediately transferred to John E. Dockendorf."

After April 10, the sundry debtors in the accounts represented by the certificates of indebtedness, which early in July remained unredeemed in the hands of the banks, and which certificates and assignments purported to be security for this sum of $105,000, paid these various sums in checks or money to the defendant in an amount exceeding $105,000. Thereupon, after demand and refusal, the banks filed these bills in the court below to enforce the alleged trust created by clause 5, seeking decrees compelling the defendant to account for and pay over to the banks the proceeds of such accounts to the amount of the bank debts. The bills were dismissed by the trial court upon the final hearing, and the banks bring these appeals. Upon those aspects of the case which we treat as controlling, the rights of the two banks are entirely analogous, and it becomes unnecessary to consider such distinctions as there may be with reference to other aspects.

John H. Watson, Jr., of Cleveland, Ohio, for appellants.

Wm. L. Day, of Cleveland, Ohio (Squire, Sanders & Dempsey, of Cleveland, Ohio, L. M. Kyes, of East Palestine, Ohio, and Thomas M. Kirby, of Cleveland, Ohio, on the brief), for appellees.

Before WARRINGTON and DENISON, Circuit Judges, and McCALL, District Judge.

DENISON, Circuit Judge (after stating the facts as above). The trial court concluded that the controlling question was as to the debtor

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and creditor relationship of the parties. In a thorough and careful opinion, it was concluded as matter of fact that this relationship did not exist between the banks and the defendant, but that it was the debtor of Dockendorf, and Dockendorf was the debtor of the banks, and it was therefore held that the defendant had the right to pay Dockendorf in full this indebtedness to him and be discharged therefrom, and was under no duty to require him to surrender any outstanding securities which it had theretofore pledged to him. There are many considerations in the written contract and in the course of business tending to support this conclusion of fact. There are other items of proof looking in the contrary direction. We cannot regard this question of fact as controlling, and we therefore pass it by without discussion, assuming, for the purposes of this opinion, that the trial court was right.

[1] We think the vital question is that of notice. It is not to be disputed that a debtor, who has pledged with his creditor any nonnegotiable security, whether tangible property or choses in action, and who is not chargeable with notice that the creditor has rightfully parted with the security so pledged, may pay his debt to his creditor and thereby become entitled to the return of his security, and that, under those conditions, the risk is carried by the second transferee of the property who has not given notice of his rights.[1] It must be equally clear that, where the creditor, who had received this pledge, has a right himself to repledge or retransfer the property for his own benefit, and where the principal debtor is chargeable with notice that such retransfer has been made, if he pays his debt without obtaining the return of the property pledged, he does so at the risk of being compelled to satisfy the claim of the second transferee in order to get his property back.

[2] In order to determine the question of Dockendorf's right to transfer these accounts over to the banks and the question of notice to the defendant on or before April 10 that such transfer had been made, it is only necessary to refer to the contract provisions above quoted, and especially to clause 5 and the provision quoted just before that clause. It is not easy to conceive a more express and complete admission by defendant of notice of the assignments in question. It seems clear to us that, in the face of this contract, the defendant cannot be heard to say that it is not chargeable with notice that Dockendorf had made that very reassignment for the purpose of making which it had made the assignment to him. Certain it is that only a clear case of justifiable belief by the defendant

[1] There is a class of cases of pledge, with power in the pledgee to repledge on his own account,—as is common with stockbroker and customer,—where the second pledgee's title is sustained even after satisfaction of the first pledge. In stating the rule above, we assume that in this class of cases, the owner, paying his own debt, is chargeable with notice of the second pledge, because of the authority given, the failure to produce and return the property pledged or the custom of the business. Whether or not this assumption as to their reasoning is correct, it has not seemed necessary now to consider or decide the claim of the banks to relief upon the analogy of the rule in these stockbroker cases.

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that Dockendorf still retained the accounts and had not transferred them could support the theory that it was not chargeable with notice of his transfer. Instead of such a clear case, we find that, when the defendant made the payment of $207,216, it was advised that Dockendorf might have transferred these accounts, and that, therefore, its only safe course was to require the surrender of the certificates of indebtedness, and then was further advised that there would be no serious danger in paying Dockendorf, because, if he did not use the money to redeem outstanding certificates, he would be guilty of embezzlement. Of course, there could be no embezzlement unless the certificates belonged to some one else. From the fact that Dockendorf did not simultaneously produce and return these certificates, the very natural inference would arise that he had disposed of them elsewhere; and, indeed, we cannot read the testimony of the president of the defendant otherwise than as containing substantial admission that he took it for granted that Dockendorf might have used more or less of these certificates somewhere, from time to time, in connection with obtaining from some one more or less of the funds advanced, and that defendant relied upon Dockendorf to use the $207,000 to redeem the certificates as the accounts matured, in so far as there might be such outstanding certificates. Under these conditions, it must be held that the defendant is chargeable with notice of the assignments which had been made to the banks.

[3] We note two criticisms of this result, which require comment. The provision quoted just before clause 5, by its very words, referred to an expected transfer to some person or financial institution, to serve as security for a loan "to be made to the undersigned." It is said that these transfers by Dockendorf to the banks were to secure loans to Dockendorf, and hence were not within the scope of the notice to be inferred. We cannot think this a substantial distinction. The loans in question were, in ultimate effect, made by the banks to the defendant through Dockendorf, even though no privity of contract arose between original lender and ultimate borrower. The precise expected form of doing business had been departed from, but the substance was the same, at least as to the reasonable inferences regarding notice. The issue is not whether knowledge or express notice by the defendant is established; the issue is whether, under all the facts and circumstances, there was enough to put the defendant on notice that the accounts had been transferred; and we are satisfied that there was enough.

[4] The other criticism is that the course of business, continued for a long time, justified the defendant in disregarding any notice it might otherwise be thought to have and in treating the accounts as belonging to Dockendorff. This course of business as to current payments by defendant to Dockendorf is not shown by the record, but there seems no reason to doubt that it took the natural and expected path, and that from time to time defendant computed the amounts which it had received in payment of assigned accounts and sent its check to Dockendorf for the amount loaned thereon, and that he receipted for the same. The record does show that he did not return the certificates of

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indebtedness which this payment would operate to redeem. We find nothing in this course of business justifying any belief that Dockendorf was not assigning over the accounts "to some person or financial institution," as the agreement contemplated he should do. Even if it may have been the custom for defendant to pay Dockendorf round sums from time to time, without reference to specific accounts, or yet to remit the full amount of accounts collected, this would not interfere with charging against defendant that notice which is here the vital thing. The contract expressly provided that, in spite of the transfer over by Dockendorf of an account, the amount thereof, when it was paid, should be remitted by the defendant to Dockendorf; and the fact that business was done pursuant to this arrangement or somewhat variant therefrom cannot avail to escape the effect of a notice declared by the contract. The practice not to return the redeemed certificates may have legitimate bearing on the issue, but it cannot control. As is pointed out hereafter, whenever an account was paid by the principal debtor to the defendant, the outstanding certificate of indebtedness ceased to represent anything; there was nothing to return.

[5] The remaining vital question (which presents itself) is whether Dockendorf was so far the agent and representative of the banks in the subject-matter that the payment of the $207,000 to him must be considered as a payment to the banks. The idea that such agency existed is more or less inconsistent with the theory that there was no obligation from the defendant to the banks; but, for the purpose of ascertaining the merits of the contention, we overlook any such inconsistency. The claim rests upon clause 5 above quoted. Whenever an assigned account was paid to the defendant, the proceeds were to be remitted to Dockendorf. The banks knew of this arrangement, and, by accepting the certificates of indebtedness with this agreement indorsed, they acquiesced. Clearly, Dockendorf became their agent for this purpose; but did the scope of his agency extend to receiving for the banks, from the defendant, out of its funds, payment for the loans secured by the assignment of the unmatured accounts? Receiving such payment is clearly not within the letter of the authority; and we are compelled to think that it was also outside of the spirit and substance of the agency.

In reaching this conclusion, we are not inclined to accept as controlling the mere distinction between a debt due and a debt not due, although it is true enough that agency to receive payment when due does not necessarily, or perhaps generally, imply agency to collect before due. If the claim of lack of authority were reduced to the bare proposition that, although Dockendorf would represent the banks in receiving payment from the defendant on its specific debt if due yesterday, yet he would not bind the banks by receiving payment of the same debt if due to-morrow, it would in this case stand on rather narrow ground. There are two reasons much more forceful than this mere distinction: The first is found in the improbability that there would have been any actual intent to give such great authority as was here assumed. It appears to be the fact that Dockendorf, although

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he called himself a banker, was really a broker, finding customers who wanted to borrow money in this way and then finding banks who would lend it. There is no proof as to his financial responsibility, and no reason to suppose that the banks would not be ordinarily prudent in dealing with him. These assigned accounts were mostly in amounts of less than $1,000. They were due and would be paid from time to time. The liability in favor of the banks that would accrue against Dockendorf under clause 5 would be for only such ones of these items as might accumulate during the short time for which returns by him to the banks could be suspended without attracting inquiry or investigation. A few thousand dollars would seem to be the total liability naturally to be expected; but if the agency extended to receiving payments from the defendant of its total debt at any time, the liability then would reach very large sums. In fact, it amounted to more than $200,000. That the banks should have intended to trust Dockendorf with receiving a few thousand dollars for them, to be turned over to them from day to day in the regular course of business, would be entirely probable; that they would intend to make him their agent to receive $200,000 and entirely close up the whole line of business and under circumstances where he could retain a large part of the amount, as it turned out more than $100,000, for more than 60 days without discovery by the banks, would be distinctly improbable. An agency of the larger scope must be supported by clear proof before its existence can be rightly inferred.

The other reason lies in the clear distinction between the two classes of transactions. The account assigned to the banks was a chose in action; it was property, and it stood as a valuable security. The moment the account was paid by the debtor to the defendant, the property or security which had been assigned to the bank disappeared from existence. There was nothing for the bank to assign back either to Dockendorf or to the defendant. The claim of the bank attached, instead, to the proceeds. These were the property of the bank, in the hands of defendant or of Dockendorf. With regard thereto, the banks had the rights of ownership, whatever complications might develop. Wherever the trust fund could be followed, it could be recovered. Payment made by the defendant on its own account was a different thing. The security—the debt assigned—continued in existence. It would be expressly, or by operation of law, retransferred to the defendant. The situation covered by clause 5 had not arisen and never could arise. The agency created by this clause was to receive for, and transmit to, the banks specific items of property already belonging to them. The agency now alleged against the banks was to collect for them, in effect by the sale of their pledged security, large sums at a time and in a manner never contemplated. We think it clear that the two agencies are so dissimilar that the creation of the first does not imply the existence of the second.

[6] Much is said about the lack of notice from the banks to defendant, and the proposition is urged that, where the creditor has made successive assignments of the same chose in action, the assignee who first gives notice to the debtor gets the better title. We agree with

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the District Court that the cases cited upon this proposition are not pertinent. They deal wholly with the right to recover against the debtor in the account which is assigned, and they have no application to a case where a creditor assigns accounts and then buys them back again. In such case, the only question must be whether he is, at the latter time, chargeable with notice that there has been an intermediate transfer to some one else; and this question we have considered.

Upon the general equities between the parties, the relative position of the defendant is—to say the least—not strong enough to justify hesitation in enforcing the applicable rules. It is fairly to be assumed that the defendant did not wish the assignments to be known to its debtors, and that Dockendorf did not wish the defendant and the banks to come into direct communication with each other. In both these desires all the parties acquiesced. The banks received assignments duly executed by defendant and expressly reciting that the accounts were assigned by the defendant for the purpose of being assigned to some bank. The only object of notice from the banks to defendant would have been to prevent action by the defendant, based on the supposition that the accounts had not been assigned, and in the face of this recital there was no object remaining for a notice to serve. We do not see any negligence on the part of the banks; on the other hand, the conduct of the defendant in making payment without getting in the certificates of indebtedness was most extraordinary and in violation of the rules of ordinary business prudence.

The complainant in each case is entitled to a decree in accordance with the prayer of the bill, and, accordingly, both decrees are reversed, and both cases are remanded for such proceedings.

(259 Fed. 388)

WOLF v. UNITED STATES.*

(Circuit Court of Appeals, Eighth Circuit. May 13, 1919.)

No. 5192.

1. INDICTMENT AND INFORMATION ⟹60—ALLEGATION OF FACTS.
   An indictment must allege facts sufficient to constitute the crime charged.

2. ARMY AND NAVY ⟹40—ESPIONAGE ACT—VIOLATION BY WORDS ALONE.
   Words alone may constitute the overt act violative of the Espionage Act June 15, 1917, declaring interference or attempted interference with the creation and operation of the armed forces of the country a crime, though words which in their nature under the circumstances could not apparently have such tendency are without the statute; the intent with which they are uttered not alone making them harmful and legally obnoxious.

3. ARMY AND NAVY ⟹40—ESPIONAGE ACT—INCITEMENT TO MUTINY—UTTERANCES.
   Utterances charged as violations of Espionage Act June 15, 1917, in that by them defendant attempted to cause disloyalty, insubordination, mutiny, and refusal of duty in the military forces of the United States, *held* not violative of the statute.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Rehearing denied January 10, 1920.

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4. ARMY AND NAVY ⚷40—ESPIONAGE ACT—OBSTRUCTION OF RECRUITING—UTTERANCES.

Utterances charged as violations of Espionage Act June 15, 1917, in that defendant thereby obstructed the recruiting and enlistment service of the United States, *held* not such as could obstruct recruiting and enlistment.

5. ARMY AND NAVY ⚷40—SUFFICIENCY—TRUTH OF CHARGE.

In construing the sufficiency of a charge of violating Espionage Act June 15, 1917, the court is not concerned with the truth or falsity of the statement alleged to have been made by defendant.

6. ARMY AND NAVY ⚷40—ESPIONAGE ACT—OBSTRUCTION OF RECRUITING—SUFFICIENCY OF INDICTMENT—"PUBLICLY."

Indictment charging a violation of Espionage Act June 15, 1917, in that defendant, to obstruct the recruiting and enlistment service, publicly stated the war with Germany was unjust, etc., *held* sufficient; "publicly" meaning in public, well known, open, notorious, common, or general, as opposed to private, secluded, or secret.

7. ARMY AND NAVY ⚷40—ESPIONAGE ACT—OBSTRUCTION OF RECRUITING—INTENT—SUFFICIENCY OF EVIDENCE.

In a prosecution for violation of Espionage Act June 15, 1917, by utterances calculated to obstruct the recruiting and enlistment service, evidence *held* insufficient to show that defendant spoke with any intent to obstruct the service.

8. ARMY AND NAVY ⚷40—ESPIONAGE ACT—EVIDENCE.

In a prosecution for violation of Espionage Act June 15, 1917, by utterances calculated to obstruct enlistment and recruiting and to cause mutiny, or refusal of duty, in the military forces of the United States, evidence concerning a certain flag incident, and serving to explain the circumstances under which defendant's statement covered by certain counts of the indictment was made, and to show that it was merely an angry, resentful outburst, *held* admissible under such counts.

9. CRIMINAL LAW ⚷315, 371(1)—EVIDENCE—INTENT—PRIOR STATEMENTS—PRESUMPTION—CONTINUANCE OF STATE OF MIND.

In a prosecution for violation of Espionage Act June 15, 1917, testimony as to statements by defendant made a few weeks before the enactment of the statute, though ordinarily admissible as tending to show defendant's state of mind, ordinarily presumed to continue, *held* inadmissible, as it cannot be presumed that a lawful state of mind, unaccompanied by expressions showing willingness to violate law, will change into a criminal intent under a future statute.

10. ARMY AND NAVY ⚷40—ESPIONAGE ACT—EVIDENCE.

In a prosecution for violation of Espionage Act June 15, 1917, testimony by defendant that he had not advised his sons not to enlist *held* inadmissible, in the absence of attempt by the government to prove for any purpose that defendant had so advised his sons.

11. CRIMINAL LAW ⚷812—INSTRUCTIONS.

In prosecution for violation of Espionage Act June 15, 1917, instructions using language by way of illustration and explanation which ordinarily would have been proper, and covering certain situations shown in the evidence, which were not the particular ones covered by the indictment, tending to inflame and divert the jury, held erroneous.

In Error to the District Court of the United States for the District of South Dakota; James D. Elliott, Judge.

John H. Wolf was convicted of violation of the Espionage Act, and he brings error. Reversed.

⚷For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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James Brown, of Chamberlain, S. D., and Edward E. Wagner, of Sioux City, Iowa (George J. Danforth, of Sioux Falls, S. D., on the brief), for plaintiff in error.

George Philip, Asst. U. S. Atty., of Rapid City, S. D. (Robert P. Stewart, U. S. Atty., of Deadwood, S. D., and E. W. Fiske, Asst. U. S. Atty., of Sioux Falls, S. D., on the brief), for the United States.

Before SANBORN and STONE, Circuit Judges, and TRIEBER, District Judge.

STONE, Circuit Judge. John H. Wolf brings his writ of error from conviction on six counts for violation of the Espionage Act. Act June 15, 1917, c. 30, 40 Stat. 217. Concurrent sentences of five years were assessed for each of the six counts.

The assignments of error present the following points: (a) Unconstitutionality of this section (section 3 [Comp. St. 1918, § 10212c]) of the Espionage Act, because it is an attempt to define and enlarge upon the constitutional definition of treason; (b) insufficiency of the indictment; (c) insufficiency of the evidence; (d) improper admission and exclusion of evidence; (e) improper refusal to charge the jury as requested, and improper charge given.

(a) The objection to the validity of the Espionage Act does not extend to those counts of the indictment dealing with the obstruction of enlistment service, but is leveled at those counts relating to causing insubordination, disloyalty, mutiny, or refusal of duty in the military forces. In our judgment, these latter counts of the indictment are insufficient; hence the question of the validity of the statute drops out of the case.

(b) The indictment is challenged as stating no violation of the Espionage Act. The counts are in pairs, covering three separate utterances. Counts 1, 3, and 5 accuse him of causing, or attempting to cause, "disloyalty, insubordination, mutiny, and refusal of duty in the military forces of the United States." Counts 2, 4, and 6, respectively, charge that by the same statements he did "obstruct the recruiting and enlistment service of the United States." The charge in counts 1 and 2 is that at Kimball, S. D., on July 1, 1917, defendant stated in the presence of John Swason, J. M. Campbell, and "to other persons to the grand jurors unknown," as follows:

"That he, the said Swason, had better be careful about what he said as he may be under the Kaiser yet before this war is over; that this war was an unjust war on the part of the United States; that it was unjust on the part of the United States government to send the boys across the ocean to fight; that he, the said Wolf, had advised his own sons not to enlist until they were drafted; that the United States was entirely unjustified in its entrance into the present war and that Germany's attitude in her unrestricted submarine warfare was perfectly proper, both before and after the entrance of the United States into the war."

The charge in counts 3 and 4 is that at the same place, about July 25, 1917, he stated to Josiah Whittecar "and to other persons, to the grand jurors unknown," as follows:

"'I would like to have a machine gun to turn into that bunch of sons of bitches. I'll bet I'd make them scatter,' he, the said Wolf, meaning thereby

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and referring then and there to a number of the enlisted men of Troop L of the First South Dakota Cavalry, the exact number of whom are to the grand jurors unknown, and then and there being in the military service of the United States, and then and there being congregated near the place of business of the said Wolf, in the county and state aforesaid."

The charge in counts 5 and 6 is that at the same place, about July 15, 1917, he said to Mrs. Millie Currence, the mother of an enlisted man, and "to other persons to the grand jurors unknown," the following:

"That the government is crazy to think that he (the said Wolf) would fight against his own blood and they won't get any of my boys. You might just as well force the Catholic religion upon the Protestants as to force me to fight against my own blood (meaning thereby the Imperial German government); that the Red Cross is a bunch of scheming people; that he would not give anything and no one could compel him to: that the boys only enlisted for notoriety; that you can make as good citizens of your boys by keeping them at home and not sending them to war; that it was nothing for Mrs. Currence to be proud of that her boy had gone to war; that the war was all a graft and that it was an unjust war."

[1] The objections urged to the sufficiency of the various counts of the indictment are: (1) That there are no allegations that the statements charged were made in the presence of members of the military or naval forces, or of persons who might have become recruits, nor were there allegations that such statements were uttered under such circumstances as would naturally lead to the communication of them to such members or persons; (2) that the remarks were not such as would naturally cause the results condemned by the statute. It is elementary that an indictment must allege facts sufficient to constitute the crime charged.

[2-6] The law as first enacted and in force at the dates covered by the indictment was not a general disloyalty statute. The portion here involved had for its purpose prevention of interference with the creation and operation of the armed forces of the country. It declared such interference or attempted interference a crime. It has been repeatedly decided that words alone may constitute the overt act. Schenk v. United States, 249 U. S. 47, 39 Sup. Ct. 247, 63 L. Ed. 470; Frohwerk v. United States, 249 U. S. 204, 39 Sup. Ct. 249, 63 L. Ed. 561; O'Hare v. United States, 253 Fed. 538, 165 C. C. A. 208; Doe v. United States, 253 Fed. 903, 166 C. C. A. 3. Words which in their very nature, or which under the circumstances of their utterance, could not apparently have a tendency to cause such interference, are without the statute. The intent with which they are uttered cannot alone make them harmful. This law was intensely practical; it sought the utilitarian result of preventing actual interference or attempted interference. It did not concern itself about mere intentions, no matter how reprehensible. It comes fairly within the expression of Pollock, C. B., in Attorney General v. Sillem, 2 H. & C. 431, 525, that "human laws are made, not to punish sin, but to prevent crime and mischief." Therefore it is necessary that the words should be of a character and uttered under such circumstances as would apparently result in such interdicted interference. These two elements are essential to the offense, and therefore to a proper charge of the of-

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fense. The effective way of pleading the character of the words is by setting them forth literally or substantially, as here done. If they carried to the hearers any hidden or special meaning, that should be alleged. The effective way of pleading the circumstances of utterance is by alleging such as show that the utterance was made to actual or possible members of such military forces, or under conditions where it would apparently reach or operate upon such persons. Within the latter class are the O'Hare Case (a public speech) and the Doe Case (an endless chain distribution of written or printed matter).

The character of the utterances as here set forth convinces that they could not cause disloyalty, insubordination, mutiny, or refusal of duty in the military forces, as charged in counts 1, 3, and 5. Nor does it seem possible that the scurrilous language covered by count 4 could have obstructed the recruiting and enlistment service. The language, or portions thereof, covered by counts 2 and 6, is different. It is in substance a statement that the war is an unjust war. We are not concerned with the truth or falsity of such statement (U. S. v. Equi, Charge to Jury, Bul. 172), but only with the effect it would apparently have upon the obstruction of recruiting and enlistment. Enlistment is a voluntary act, and anything which would tend to prevent a state of mind favorable thereto would be deterrent, and therefore an obstruction to such action. Certainly the belief that a war was unrighteous would ordinarily be a decided barrier to a resolution voluntarily to risk life in its prosecution. This has been recognized in the Doe Case and many other cases. Therefore, as to those two counts, the language, as alleged, is sufficient to constitute the offense, if uttered with the unlawful intent and under circumstances where it would apparently accomplish the forbidden results. The intent is properly alleged. The circumstances, as alleged, are that the statements were "publicly" made to certain named person or persons and "to other persons to the grand jurors unknown." "Publicly" means in public, well known, open, notorious, common, or general, as opposed to private, secluded or secret. The clear inference from the allegation would seem to be that the statement was uttered in the presence of a number of persons. There is no allegation that any of the immediate listeners were within the enlistment ages. The doctrine of the O'Hare and Doe Cases is that a statement to which wide publicity was given by the defendant would apparently reach men who might become recruits, and that it is unnecessary to prove, and therefore to allege, that such were actually present or actually were reached by the statements. Naturally the extent of publicity would be an important consideration and, within certain limits, decisive. The extent and character of the publicity must be such that the apparent result of the utterance would be obstruction of the recruiting and enlistment service. But these may be generally stated, subject to a bill of particulars in proper instances. No such bill was filed here, and the general allegations that the statements were publicly made to certain persons and to others unknown is sufficient.

[7] With counts 2 and 6 held sufficient, it is necessary to examine the other assignments of error in so far as applicable to them.

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The sufficiency of the evidence is, in our judgment, properly challenged. There is no subtantial testimony in either instance of the slightest intention to obstruct the service. The intention necessary to be shown is willfulness—deliberate purpose. Defendant is a merchant in a town in South Dakota. The statement covered by count 2 occurred during a discussion of the war between defendant on one side and three acquaintances on the other. The other three approved the war; one of them had three sons then enlisted. It is very evident that the sole result which occurred, or really was to be expected, was that each of the four remained firm in his own conviction. The statute, as originally enacted, was not framed to prevent free discussion or expression of opinion, so long as such was not deliberately employed for the purpose of interfering with the creation and operation of the armed forces of the nation. The statement covered by count 6 was made in the defendant's home, in the presence of his wife, to a chore woman. It was an ill-natured, intemperate outburst, brought on by seeing Red Cross pictures in a magazine. The woman properly resented his language, and stated that she had a son who had enlisted, and that she was proud of it. The evidence in the entire case clearly shows an instance of a headstrong, willful man, who felt strongly about the war, and who insisted, in and out of season and in intemperate and sometimes scurrilous language, on voicing his views. It also clearly shows that the natural and only result thereof was to arouse the resentment of his neighbors to a point dangerous to himself; one manifestation being a sort of vigilante visit from members of the local guard organization, which occasioned the filthy, resentful outburst covered by counts 3 and 4 of the indictment.

[8] There are several assignents of error relating to the admission or exclusion of evidence. The evidence of Whittecar concerning the flag incident was competent and actually favorable to defendant, in connection with the charges in counts 3 and 4, since it served to explain the circumstances under which the statement covered by those counts was made, and that it was merely an angry, resentful outburst. It had no bearing on any other part of the case, and would be incompetent except for those counts.

[9] The court admitted evidence by Galbraith and by Lawton of statements by defendant made a few weeks before the enactment of this statute. Ordinarily such statements, made only a few weeks prior to those covered by the indictment, would be evidence bearing on intent, since it would tend to show his state of mind, which is presumed to continue. But it cannot be presumed that a state of mind, entirely lawful at the time and not accompanied by expressions showing a willingness to violate law, will change into a criminal intent under a future statute. State v. Wenzel, 72 N. H. 396, 56 Atl. 918; Rhodes v. State, 75 Tex. Cr. R. 659, 172 S. W. 252; Pooley v. Dutton, 165 Iowa, 745, 147 N. W. 154.

[10] Assignment 7 is to the refusal of testimony by the defendant to the effect that he had not advised his sons not to enlist. No attempt was made by the government to prove, for any purpose, that defendant had advised his sons not to enlist. Whether he did or not

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was immaterial. The question here was whether he made, in substance, the statements alleged in the indictment. The testimony was properly excluded.

[11] Assignment 8 drops from the case with counts 3 and 4, to which it referred. Assignments 9 to 15, inclusive, relate to instructions refused or to the charge as given. Of these, 9 to 13, inclusive, have been fully covered by what has been said concerning the sufficiency of the indictment and of the evidence. Assignments 14 and 15 relate to language used in the charge which defendant claims tended to inflame and divert the jury. The language was used by way of illustration and explanation, and ordinarily would have been entirely proper. However, it covered certain situations shown in the evidence which were not the particular ones covered by the indictment—notably the so-called "flag incident." We think the criticisms well taken. The greatest danger to justice from a jury is through a confusion of the real issues in the case. This is peculiarly true when the times or circumstances or character of crime are such as to make jurymen lose sight of the questions of fact actually involved. It is natural, in time of war, when patriotic sentiment is high, that it is particularly difficult to secure a fair trial for men accused of crimes connected with the war. At such times the task of the court becomes especially difficult and requires great care to prevent miscarriage of justice. These are practical considerations, which must be constantly borne in mind, or the verdicts of juries in such cases will mistakenly become expressions of their hatred for unpatriotic acts in general, instead of their careful judgment on the facts shown by the evidence in the particular case. Patriotism must not become, even innocently, a cloak for injustice. The right of an accused in the courts of this nation to a fair trial must not vary with the character of the crime. The variation permitted is in the punishment, but that comes only *after* a fair trial.

With instructions to proceed in accordance with this opinion, the case is reversed.

(259 Fed. 394)

BARNETT et al. v. KUNKEL et al.

(Circuit Court of Appeals, Eighth Circuit. April 12, 1919.)

No. 5208.

1. INDIANS ⟹15(1)—DEED OF INHERITED LAND—APPROVAL BY COURT—JURISDICTION.

A deed by the mother of a minor full-blood Creek Indian, who inherited an allotment of land from her daughter, was of no effect, where approved by the county court of a county of Oklahoma in which the daughter was not a resident when she died; the court not having had jurisdiction.

2. INDIANS ⟹15(1)—ALLOTMENT OF LAND—DEED—STATUTES—"RESTRICTIONS."

Deed of a minor full-blood Creek Indian's allotment of land, inherited by her mother, executed two days before patent for the land was issued, though the selection of the allotment had been legally made and approved before, *held* not void under Act April 26, 1906, § 19, and Act May 27, 1908, § 5, rendering void a deed of lands of the Five Civilized Tribes, if made

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before the removal of "restrictions"; "restrictions," as used, referring to prohibitions against alienation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Restriction.]

3. INDIANS ⟹15(1)—DEED OF ALLOTMENT—APPROVAL BY COUNTY COURT—LAPSE OF TIME.

Where the mother of a minor full-blood Creek Indian inherited her daughter's allotment, and deeded it to another in 1909, the approval of the deed by the county court of the county of Oklahoma where the daughter was resident when she died was not void because not made until 1913; mere lapse of time not destroying the deed or taking away power to approve it.

4. COURTS ⟹366(30)—FEDERAL COURT—BINDING FORCE OF STATE DECISION.

A decision of the highest court of a state, defining the powers of an inferior court under the state Constitution and laws, is binding on the Circuit Court of Appeals.

5. COURTS ⟹366(16)—FEDERAL COURT—BINDING FORCE OF STATE DECISION.

Decision of the highest court of a state, determining when an order approving a deed of real property in the state is sufficient to give the deed full validity, constitutes a rule of real property, and probably binds a federal court sitting in the state.

6. INDIANS ⟹15(1)—INHERITED ALLOTMENT—APPROVAL OF DEED IN VACATION.

Order of the county judge of a county of Oklahoma wherein a minor full-blood Creek Indian was resident when she died, approving deed of the mother of such Indian, who had inherited her allotment, *held* not void because made at the home of the judge, instead of the courthouse, the judge having been ill, or because the term of the county court had adjourned and the adjournment was entered on its records prior to the approval of the deed, while no other term had been legally called, so that the order was entered in vacation.

7. JUDGMENT ⟹521—COLLATERAL ATTACK—CROSS-BILL TO SET ASIDE FOR FRAUD—DISMISSAL ON MERITS.

In suit to quiet title to land formerly the allotment of a minor full-blood Creek Indian, who died, so that the land was inherited by her mother, a defendant, who conveyed it to plaintiffs' predecessor, in view of defendants' cross-bill and offer of proof showing that the mother's attorney, while purporting to act for her in securing the approval of her deed, and in causing decree to be entered in her suit for cancellation against the grantee, forever barring her right, was in fact acting on behalf of the grantee's successor, etc., *held*, that a summary disposition of the case by entry of decree for plaintiffs and dismissal of the cross-bill on the merits was improper, it being the duty of the court to hear defendants' proofs; the cross-bill not constituting a collateral attack on the order of the county court of Oklahoma approving the mother's deed, but standing as an original bill to set aside for fraud the order approving the deed.

8. JUDGMENT ⟹441—VACATION FOR FRAUD OR COLLUSION—JURISDICTION OF EQUITY.

A court of equity has jurisdiction to set aside judgments obtained by fraud or collusion.

9. ATTORNEY AND CLIENT ⟹77—PRINCIPAL AND AGENT ⟹162—BETRAYAL OF PRINCIPAL OR CLIENT—FRUITS OF BARGAIN.

One who seduces an agent to betray his principal, or an attorney his client, can hold none of the fruits of his bargain.

10. EVIDENCE ⟹91—BURDEN OF PROOF—AFFIRMATIVE CLAIM.

An affirmative claim must be proved by the party who seeks its benefit.

Appeal from the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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Suit by W. A. Kunkel and the Prairie Oil & Gas Company against Hannah Canard Barnett and Tucker K. Barnett, wherein defendants filed cross-bill. From a decree for plaintiffs, dismissing the cross-bill on the merits, defendants appeal. Reversed.

Malcolm E. Rosser, of Muskogee, Okl., and Lewis C. Lawson, of Holdenville, Okl. (Charles A. Moon and Francis Stewart, both of Muskogee, Okl., on the brief), for appellants.

Alexander A. Davidson, of Tulsa, Okl. (P. C. West, R. S. Sherman, Grey Moore, and James A. Veasey, all of Tulsa, Okl., and John B. Patterson, of Okemah, Okl., on the brief), for appellees.

Before HOOK and CARLAND, Circuit Judges, and AMIDON, District Judge.

AMIDON, District Judge. This is a suit in equity by Kunkel and the Prairie Oil & Gas Company against Hannah Barnett and others, to quiet title to a parcel of land which was formerly the allotment of Mahaley Watson, a full-blood Creek, who died while a minor. Hannah Barnett was her mother and sole heir. Defendants answered, and also filed a cross-bill. In these pleadings they denied the equity of the original bill, and asked as affirmative relief that plaintiff's title be canceled and annulled, and that title be quieted and confirmed in Hannah Barnett. The trial court received the plaintiff's proof. When defendants offered evidence in support of their answer and cross-bill, objection was made upon the ground that the same did not state facts sufficient either to constitute a defense, or to entitle defendants to affirmative relief. The court required defendants to make an offer of their proof. This was done, and objection to the same by plaintiffs was sustained, and an exception saved. The court then entered a decree in favor of the plaintiffs and dismissed the cross-bill upon the merits. The present appeal seeks a review of that decree.

We will summarize the cross-bill and defendants' offer of proof. It will, of course be understood that what we say is not proven facts, but defendants' claim, with reasonable inferences such as we are required to indulge in determining whether the trial court's summary disposition of defendants' case was proper.

[1] All parties agree that title to the allotment passed to Hannah Barnett upon the death of Mahaley Watson. March 22, 1909, Hannah executed a deed of the property to one Simms. This deed was presented to the county court of Hughes county and approved. That court, however, was not the one which had jurisdiction, as the minor was a resident of and died in Okfuskee county, so the approval was void, and the deed of no effect. Okla. Oil Co. v. Bartlett, 236 Fed. 488, 149 C. C. A. 540.

Four years later, in March, 1913, Hannah, by a written contract, employed an attorney by the name of Crump to take proper proceedings to have the Simms deed set aside as a cloud upon her title. She also gave Crump a lease of 80 acres of land for 99 years. The contract forbids any settlement or compromise of the suit, except with the approval of the county court of Okfuskee county. It also requires

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that a copy be filed with that court. This contract is likewise made a part of the lease. The lease itself forbids its assignment or any right thereunder "until the title to the allotment of Mahaley Watson, deceased, shall have been quieted, as per the terms of the written contract hereinabove referred to." Both instruments are expressly made binding upon successors and assigns. They were filed and approved by the county court. March 27, 1913, the lease was also filed in the office of the register of deeds of Creek county, where the land is located.

Hannah had frequently been solicited to give a new deed of the property, which she had consistently refused to do. In March, 1913, Crump brought the suit required by his contract with her, making Simms, Litchfield (who had succeeded by deed to Simms' rights), and others defendants. The contract with Crump, and the lease to him, were attached as exhibits to the complaint. Simms disclaimed. Litchfield answered.

May 26, 1913, Crump, in violation of the express provisions of the lease, assigned the same to Litchfield. This assignment refers to the lease and the contract, so Litchfield had notice of their restrictions. On the same day Crump also gave Litchfield a quitclaim deed of the land. Neither the deed nor the assignment of the lease was ever approved by the county court. In June, 1913, Crump, while acting as attorney for Hannah, entered into a corrupt agreement with Litchfield, in consideration of $5,000 paid to him personally, and upon a new consideration of $2,000 for himself and Hannah. By the terms of this agreement he was to induce Hannah to execute a new petition for the approval of the Simms deed, which was to be presented to the judge of the county court of Okfuskee county, and an approval of the deed secured. As a part of the same corrupt agreement, the suit then pending against Litchfield to cancel the deed was to be dismissed with prejudice against the bringing of any other suit. In the execution of this contract it is charged that Crump represented to Hannah that the suit to cancel the Simms deed would require a long litigation, and that he desired to be released from his obligation, and in order to secure such release the consent of the county court would have to be obtained. The $2,000 was stated to be a consideration for this release, and for royalties due her on the property. Upon such representations she was induced to sign a petition for the approval of the Simms deed. She was unable to read or speak English, and relied wholly upon the advice of her attorney, and never knew that the petition was for the approval of the deed. This petition was presented to the judge of the county court at his home at a time when he was seriously ill, and also at a time when the term of the county court of Okfuskee county had been adjourned. He signed an order approving the deed, which was afterwards filed with the clerk of his court, not by the judge himself, but presumably by Crump, or somebody acting on behalf of Litchfield. The judge later died without ever again returning to the courthouse, or performing any judicial act there. In performance of the agreement between Litchfield and Crump, a written stipulation, signed by Crump as attorney for Han-

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nah, and by counsel purporting to act on behalf of Simms, Litchfield, and the other defendants, was filed in the state court, where the suit had been brought for the cancellation of the Simms deed, and also in the federal court, to which the suit had been removed, and a decree was entered in each of those courts upon the stipulation, adjudging that Hannah had no right, title, or interest in the land, perpetually enjoining her from asserting any claim or right to it, and establishing the title in Litchfield.

The case has been involved in many immaterial issues, which have added greatly to the difficulties of its trial in the lower court and its argument here. We will first dispose of the most meritorious of these issues.

[2] 1. It is argued that Hannah's deed to Simms was void. This contention rests upon the fact that the deed was executed two days before the patent for the land was issued, though the selection of the allotment had been legally made and approved long before. Section 19 of the Act of April 26, 1906 (34 Stat. 144, c. 1876), and section 5 of the Act of May 27, 1908 (35 Stat. 313, c. 199) render a deed of lands of the Five Civilized Tribes void, if made "before the removal of restrictions therefrom." It is argued through many pages that the land here was subject to restriction within the meaning of these laws, because the patent had not been issued, and the land was therefore subject to the jurisdiction of the Land Department, and it was within the power of that department to cancel the selection for cause. This position is untenable, because the term "restrictions," as used in the acts of 1906 and 1908, refers to prohibitions against alienation. The power of the Land Office to cancel a selection does not constitute a restriction within the meaning of these statutes. Section 22 of the act of 1906 expressly provided:

> "That the adult heirs of any deceased Indian of either of the Five Civilized Tribes *whose selection has been made*, or to whom a deed or patent has been issued for his or her share of the land of the tribe, * * * may sell and convey the lands inherited from such decedent."

Section 9 of the act of 1908 also provides:

> "That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land."

It has been the uniform holding that an allottee may convey the equitable title under a certificate of allotment, before patent, if the lands are not otherwise subject to restraint against alienation. Thomason v. Wellman, 206 Fed. 895, 124 C. C. A. 555; Mullin v. United States, 224 U. S. 448, 32 Sup. Ct. 494, 56 L. Ed. 834; Goat v. United States, 224 U. S. 458, 32 Sup. Ct. 544, 56 L. Ed. 841; Duncan Townsite Co. v. Lane, 245 U. S. 308, 38 Sup. Ct. 99, 62 L. Ed. 309. There is nothing in Ballinger v. United States, 216 U. S. 240, 30 Sup. Ct. 338, 54 L. Ed. 464, Skelton v. Dill, 235 U. S. 206, 35 Sup. Ct. 60, 59 L. Ed. 198, United States v. Wildcat, 244 U. S. 111, 37 Sup. Ct. 561, 61 L. Ed. 1024, Starr v. Long Jim, 227 U. S. 613, 33 Sup. Ct. 358,

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57 L. Ed. 670, Monson v. Simonson, 231 U. S. 341, 34 Sup. Ct. 71, 58 L. Ed. 260, Franklin v. Lynch, 233 U. S. 269, 34 Sup. Ct. 505, 58 L. Ed. 954, or Okla. Oil Co. v. Bartlett, 236 Fed. 495, 149 C. C. A. 540, or in any other of the numerous cases cited by counsel, which upon a reasonable interpretation furnishes any foundation for the contention that the Simms deed was void because made before the patent for the land was issued.

[3] 2. It is urged that the approval of the Simms deed by the county court of Okfuskee county was void, because the deed itself was executed in 1909, and the approval was not made until 1913. The mere running of time, however, did not destroy the original deed, nor take away the power of the court to approve it. It simply rendered more difficult the investigation which the court ought to make before such approval. The act of approval is administrative. It contemplates that there shall be such an inquiry as satisfies the court that the making of the deed at the time of its execution, and upon the consideration then paid, is just and equitable, and for the best interest of the grantor. In a field where values are rapidly changing as in western Oklahoma, the passage of four years' time increases the difficulty of such an inquiry, and ought to make the court much more cautious in awarding approval than when the deed is promptly presented. Mere lapse of time, however, does not destroy the deed or take away the power to approve it. Lomax v. Pickering, 173 U. S. 26, 19 Sup. Ct. 416, 43 L. Ed. 601; Lykins v. McGrath, 184 U. S. 169, 22 Sup. Ct. 450, 46 L. Ed. 485.

[4-6] 3. A more serious contention is that the order of the county judge approving the Simms deed was void: (a) Because made at the home of the judge, instead of the courthouse; (b) because the term of the county court for Okfuskee county had been adjourned, and the adjournment entered upon its records, prior to the approval of the deed, and no other term had been legally called, so the order was entered in vacation. Both of these questions were before this court in United States v. Black, 247 Fed. 942, 160 C. C. A. 132, and the decision is conceded to have been against defendants' present contention. We have examined the authorities cited by counsel carefully, and considered their argument, and find no sufficient reason for modifying our former decision. It is true that there is some language in the decisions of the Supreme Court of Oklahoma tending to show that a judge cannot act judicially, except in the place officially established for holding his office, and that his act in vacation is not the act of the court. The cases most nearly in point are McHarry v. Eatman, 29 Okl. 46, 116 Pac. 935 (which seems to be qualified in Campbell v. Dick, 157 Pac. 1062), and Eischoff v. Caldwell, 51 Okl. 217, 151 Pac. 860, L. R. A. 1917E, 359. These were cited and fully considered in the Black Case. There is no decision, however, of the highest court of the state, ruling that the act of a county judge in vacation, in a case like this, is not the act of the court, or that his act outside of the courthouse is void. The local statute declares that for many purposes county courts shall be deemed to be always open. As to matters which

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do not require the presence of a jury, the distinction between the judge and the court is formal. It is the common practice of American judges, sitting at nisi prius, to hear arguments, and make orders and judgments, without the presence of their clerk or executive officer. Such orders and judgments, when filed with the clerk and entered upon the court's record, are treated precisely as if the clerk had been present at the time of the argument, and heard the order orally, or received it as signed from the hand of the judge. The rule which counsel urges would greatly hamper judicial administration, without any compensating security to the public. We recognize that a decision of the highest court of a state, defining the powers of an inferior court under the local Constitution and laws, would be binding upon this court. We further recognize that such a decision, determining when an order approving a deed of real property in the state is sufficient to give the deed full validity, would constitute a rule of real property, and would probably be binding upon a federal court sitting in the state. No such decision, however, has been called to our attention as to the specific question here involved, and we therefore can discover no adequate reason for modifying our decision in United States v. Black.

[7-9] We come now to the serious issue in the case. The cross-bill and the offer of proof show that Hannah Barnett's attorney, Crump, while purporting to act as her counsel, in securing the approval of the deed, and in causing a decree to be entered in her case against Simms and Litchfield, forever barring her right to the property, was in fact acting on behalf of Litchfield, and upon a consideration paid by him, and that Hannah was wholly ignorant of what was going on when the deed was approved. While the allegations of the cross-bill are indefinite, we think they are sufficient to forbid a summary disposition of the cause, such as was made. It was the duty of the court to proceed with the trial of the case, to hear the proofs of the defendants, and, if the merits of the controversy required an amendment of the cross-bill, permission should have been granted to amend it. If the charge was substantiated, the approval of the deed was a nullity, and the charge was of too serious a character to be disposed of without a full trial. The cross-bill stands upon the same ground as an original bill seeking to set aside the order approving the deed. It was not a collateral attack. That a court of equity has jurisdiction to set aside judgments obtained by fraud or collusion is not open to doubt. Arrowsmith v. Gleason, 129 U. S. 86, 100, 9 Sup. Ct. 237, 32 L. Ed. 630; Simon v. Southern Railway Co., 236 U. S. 115, 35 Sup. Ct. 255, 59 L. Ed. 492; Burt v. Gotzian Co., 102 Fed. 973, 43 C. C. A. 59; Young v. Sigler (C. C.) 48 Fed. 182; National Surety Co. v. State Bank, 120 Fed. 593, 56 C. C. A. 657, 61 L. R. A. 394. If the solemn judgments of courts can be thus set aside, much more can the administrative acts of a county court, approving the deeds of Indians for inherited lands. One who seduces an agent to betray his principal, or an attorney his client, can hold none of the fruits of his bargain. Alger v. Anderson (C. C.) 78 Fed. 729, and cases there cited.

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[10] Plaintiffs claim to be bona fide purchasers. That, however, is an affirmative claim, and must be proven by the party who seeks its benefit. Wright-Blodgett Co. v. United States, 236 U. S. 397, 35 Sup. Ct. 339, 59 L. Ed. 637.

The decree is reversed.

(259 Fed. 401)

LOPEZ v. HOWE, Immigration Com'r.

(Circuit Court of Appeals, Second Circuit. May 14, 1919.)

No. 216.

1. ALIENS ⟹18—EXPULSION—RIGHT OF CONGRESS.

The right of Congress to exclude or expel aliens, or any class of aliens, absolutely or upon conditions, in war or in peace, is an inherent and inalienable right of every sovereign and independent nation, which may be exercised entirely through executive officers.

2. ALIENS ⟹54—DEPORTATION PROCEEDINGS—REVIEW.

To successfully attack an order for the deportation of an alien, under Immigration Act Feb. 5, 1917, it must be shown that the proceedings upon which the order is based were unfair, or that the alien has been denied a fair hearing, or that there has been an abuse of discretion on the part of the executive officers of the United States.

3. ALIENS ⟹53—DEPORTATION—GROUNDS—ANARCHICAL TEACHINGS.

A Spanish alien, who believes and teaches anarchy as a philosophical theory, but does not advocate violence, is liable to deportation under Immigration Act Feb. 5, 1917, notwithstanding that he had been a resident in the United States for 15 years.

Appeal from the District Court of the United States for the Southern District of New York.

Proceedings to deport Frank R. Lopez for violation of Immigration Act Feb. 5, 1917. A decree of deportation was approved by the Commissioner General of Immigration and the Acting Secretary of Labor, and a warrant directing Frederick C. Howe, as Commissioner of Immigration of the Port of New York, to deport relator, was issued. From the dismissal of a writ of habeas corpus, relator appeals. Appeal dismissed, and order affirmed.

Charles Recht, of New York City (Sidney R. Fleisher, of New York City, of counsel), for appellant.

Francis G. Caffey, U. S. Atty., of New York City (David V. Cahill, Asst. U. S. Atty., of New York City, of counsel), for respondent.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

ROGERS, Circuit Judge. The relator has been ordered deported from this country to Spain and is in custody of the Commissioner of Immigration at the port of New York. The relator was taken into custody under a warrant which charged him with being in the United States in violation of the Immigration Act of February 5, 1917, c. 29, 39 Stat. 874. Section 3 of that act (Comp. St. 1918, § 4289¼b) provides that certain enumerated classes of aliens shall be excluded from admis-

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sion into the United States. Among the classes so excluded are anarchists, and the provision referring to them may be found in the margin.[1] And section 19 of the Act (Comp. St. 1918, § 4289¼jj) provides for the arrest and deportation within 5 years after entry of any alien who at the time of entry was a member of one or more of the classes excluded by law. It then provides for the deportation of classes of aliens therein mentioned, irrespective of the time of their entry into the United States, and among those so specified is the following:

"Any alien who at any time after entry shall be found advocating or teaching the unlawful destruction of property, or advocating or teaching anarchy, or the overthrow by force or violence of the government of the United States or of all forms of law or the assassination of public officials."

The warrant charged that the relator had been—

"found advocating or teaching anarchy, or the overthrow by force or violence of the government of the United States or of all forms of law, or the assassination of public officials; that he was at the time of his entry into the United States a member or affiliated with an organization entertaining and teaching disbelief in or opposition to organized government, or teaching the duty, necessity, or propriety of the unlawful assaulting or killing of any officer, or officers, either of specific individuals, or of officers generally of the government of the United States, or of any other organized government, because of his or their official character; and that he was an anarchist or person who at the time of his entry believed in or advocated the overthrow by force or violence of the government of the United States, or of all forms of law, or who disbelieved in or was opposed to organized government, or who advocated the assassination of public officials."

An arrest followed, and the relator was taken into custody at Boston. A hearing was held in that city on June 25, 1918, and on July 22, 1918. These hearings resulted in a recommendation by the immigrant inspector at Boston that the relator be deported. The finding was that the relator—

"is an anarchist, and, in my opinion, a dangerous one, and he is teaching, through these publications that he handles, coming from all parts of the world to him, the idea of social revolution and anarchy, all of which he acknowledges in the hearing."

The findings and recommendation were submitted to the Commissioner General of Immigration and the Acting Secretary of the Department of Labor, and were reviewed by them and approved. A warrant, directing that the Commissioner of Immigration of New York deport the relator to Spain, was issued by the Acting Secretary of the Department on November 4, 1918.

1 "* * * Anarchists, or persons who believe in or advocate the overthrow by force or violence of the government of the United States, or of all forms of law, or who disbelieve in or are opposed to organized government, or who advocate the assassination of public officials, or who advocate or teach the unlawful destruction of property; persons who are members of or affiliated with any organization entertaining and teaching disbelief in or opposition to organized government, or who advocate or teach the duty, necessity or propriety of the unlawful assaulting or killing of any officer or officers, either of specific individuals or of officers generally, of the government of the United States or of any other organized government, because of his or their official character, or who advocate or teach the unlawful destruction of property. * * *" U. S. Comp. St. Supplement 1917, p. 233 (Comp. St. 1918, § 4289¼b).

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A writ of habeas corpus was obtained on behalf of the relator, and after a hearing in the United States District Court for the Southern District of New York the writ was dismissed, and on December 20, 1918, the relator was remanded to the custody of the United States Commissioner of Immigration at the port of New York.

[1] The right of Congress to exclude or to expel aliens, or any class of aliens, absolutely or upon conditions, in war or in peace has been declared by the Supreme Court an inherent and an inalienable right of every sovereign and independent nation. In Fong Yue Ting v. United States, 149 U. S. 698, 13 Sup. Ct. 1016, 37 L. Ed. 905, the court held that the power of Congress to expel might be exercised entirely through executive officers. And see Wong Wing v. United States, 163 U. S. 228, 16 Sup. Ct. 977, 41 L. Ed. 140. This doctrine was reasserted in Low Wah Suey v. Backus, Commissioner of Immigration, 225 U. S. 460, 32 Sup. Ct. 734, 56 L. Ed. 1165. In the case last cited the court said:

"A series of decisions in this court has settled that such hearings before executive officers may be made conclusive when fairly conducted. In order to successfully attack by judicial proceedings the conclusions and orders made upon such hearings, it must be shown that the proceedings were manifestly unfair, that the action of the executive officers was such as to prevent a fair investigation, or that there was a manifest abuse of the discretion committed to them by the statute. In other cases the order of the executive officers within the authority of the statute is final. United States v. Ju Toy, 198 U. S. 253 [25 Sup. Ct. 644, 49 L. Ed. 1040]; Chin Yow v. United States, 208 U. S. 8 [28 Sup. Ct. 201, 52 L. Ed. 369]; Tang Tun v. Edsell, 223 U. S. 673 [32 Sup. Ct. 359, 56 L. Ed. 606]."

[2] The present proceeding is an attack upon the order issued by the Acting Secretary of Labor directing the respondent, the Commissioner of Immigration at Ellis Island, New York Harbor, to deport the relator to Spain, the country whence he came. To successfully attack that order it must be shown that the proceedings upon which the order is based were unfair, or that the relator has been denied a fair hearing, or that there has been an abuse of discretion on the part of the executive officers of the United States.

It is asserted that the relator is not within the enumerated classes. It is admitted that he is an anarchist. The following testimony was given by the relator at the hearing before the inspector:

"Q. Do you believe in or advocate the overthrow by violence or force of the government of the United States? A. No, sir.

"Q. Any other government, Spanish, or Italian, or Mexican? A. No, sir; our ideals are founded on education.

"Q. What are your ideals? A. Free thinking.

"Q. Don't you believe in the power of authority? A. What do you mean?

"Q. Organized government. Don't you think, if the President gives an order when Congress empowers him, that it should be obeyed? A. Yes; the orders should be obeyed.

"Q. Do you believe in the propriety of assassination of public officials of the United States or any other government? A. No, sir; not only of officials, but of nobody. Everybody has a right to live.

"Q. Do you believe in anarchy? A. What do you mean by anarchy?

"Q. Well, it would be anarchy to fight against the laws of the United States, tear down buildings, blow them up. A. Anything else? I believe in anarchy, but not in the way you explain it. I believe in anarchy, but it is not the

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way you explain it, or the way newspapers say anarchy is. Anarchy, the way newspapers explain it, assassinating women and children, dropping bombs, or anything like that, I don't believe in that. But I believe in teaching, educating, and telling the people to better their conditions. If you mean that, I am proud of being an anarchist. I am against killing and against destruction. We are to construct.

"Q. How are you going to proceed to do this? A. We are not going to force our ideals on anybody's mind. We have conferences; we have lectures. The doors are open, and everybody is welcome.

"Q. You try to get people through advertising means? A. Yes; for educational purposes.

"Q. For the educational purposes of teaching them anarchy? A. To teach them anarchy the way we understand it, but not the way you understand it; the way many writers understand it.

"Q. What writers? A. Tolstoi, Marx, Ferrer, Zola, Kropotkin, and many others."

[3] Because he is a philosophical anarchist, and is opposed to the overthrow of government by force or violence, the relator claims he is not within the provisions of section 19 of the act of Congress, except in the 5-year class, and that, as he has been in this country for 15 years, he cannot be deported. From what has been said in an earlier part of this opinion, it appears that the relator's understanding of the statute differs from the understanding of this court. That section deals with a number of different classes of aliens, and provides that certain classes may be deported at any time within 5 years after entry, but does not so limit the time of deportation as respects certain other classes, as to whom it is declared they may be deported, irrespective of the time of their entry into the United States. An alien at the time of his entry may not be an anarchist, and therefore may be entitled to enter. But if, at any time after his entry, he is found "advocating or teaching anarchy," he may be deported. The relator's testimony, only a portion of which has been quoted, shows conclusively that he is an advocate and a teacher of anarchy, making speeches in its favor, organizing anarchist groups, and distributing anarchist literature. As he reads and writes Spanish, Italian, Portugese, and English, he is a man of ability, who naturally has influence with his associates. That he is liable under the law to deportation admits of no doubt.

It is true he had no counsel at the hearing, but his right to counsel was not denied to him. He was asked whether he waived his right to be represented by counsel, and replied, "Well, yes." We have not discovered that any unfair advantage has been taken of him.

The fact that he is only a philosophical anarchist, and not an advocate of a resort to force and revolution, makes him, in the opinion of Congress, none the less a dangerous presence. His theories, if they could be put in practice, would end the government of the United States, and to that government he recognizes no allegiance, never having become a citizen of the United States. If the government considers his presence undesirable, because of his advocacy of a doctrine which it regards as inimical to civilization, it must have the power to send him out of the country, and back to the country whence he came.

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At the hearing the following colloquy occurred:

"Q. If you are ordered deported, do you want to be separated from your wife and boy, or would you desire to have them go with you to Spain. A. It's up to the government; I think it is an injustice; I have done nothing wrong; I call it an injustice; if a man is going to be punished for his thoughts and ideas, it is an injustice."

But it cannot be an injustice to send out of the country one who has no right to remain, having forfeited whatever right he had, not because of any thoughts and ideas he entertains, but because of thoughts and ideas to which he gives utterance and advocacy, and seeks to instill into the minds of others, whom he seeks to reach and influence. Whether it is wise or unwise for such as he to be sent out of the United States is not a question upon which courts can express any opinion. That is a question for the Congress, and not for the judiciary.

A great deal was said at the argument of the distinction between philosophical anarchists and anarchist communists. The two represent very different schools of thought. There is a class of honest and law-abiding visionaries, who are convinced that the interest of society would be promoted by the abolition of all government whatsoever. Their propaganda is purely educational in character, and violence does not enter into it. They do not believe in force, or in war, or in the taking of human life. The relator evidently belongs to that class. But, while the student of social science may discriminate between philosophical anarchists and other kinds of anarchists, the act of Congress now under consideration does not; and no such discrimination is necessary, for the constitutional power to exclude or to deport does not depend upon whether the alien is or is not a criminal, or the advocate of lawless ideas.

The appeal is dismissed, and the order remanding the relator to the custody of the United States Commissioner of Immigration is affirmed.

(259 Fed. 405)

AMERICAN LOCOMOTIVE CO. v. THORNTON.

(Circuit Court of Appeals, Fourth Circuit. April 1, 1919.)

No. 1671.

1. TRIAL ⟹420—DIRECTED VERDICT AT CLOSE OF PLAINTIFF'S CASE.
   Refusing a motion for a directed verdict at close of plaintiff's case is not erroneous where defendant subsequently offers evidence in its own behalf.
2. TRIAL ⟹142—DIRECTED VERDICT—EVIDENCE.
   Defendant's motion for a directed verdict at close of plaintiff's case was properly refused where reasonable men might reasonably differ as to inferences to be drawn from the evidence.
3. MASTER AND SERVANT ⟹278(5)—PERSONAL INJURY—SUFFICIENCY OF EVIDENCE.
   Evidence that a defective unguarded machine broke a tool as plaintiff employé was passing by, that part of such tool struck him in the eye,

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that tools did not break if the machine was in proper condition, and that no inspection was made of the machines, etc., *held* to sustain a verdict that defendant employer was negligent.

4. MASTER AND SERVANT ⟹201(3)—PERSONAL INJURY—NEGLIGENCE OF FELLOW SERVANTS.

Where plaintiff employé was not operating the machine which caused his injury, defendant employer is liable for its own negligence, although certain of its repairmen may also have been negligent and contributed to plaintiff's injury.

5. MASTER AND SERVANT ⟹235(7)—PERSONAL INJURY—PLAINTIFF'S DUTY TO DISCOVER DEFECTS.

An employé may assume that his employer has provided, and is maintaining, safe machinery and appliances.

6. MASTER AND SERVANT ⟹235(7)—PERSONAL INJURY—PLAINTIFF'S DUTY TO DISCOVER DEFECTS.

Plaintiff employé, who was not required to inspect or repair his employer's machinery, is not precluded from recovering for personal injuries because he failed to discover defects which were observable only after close examination.

7. MASTER AND SERVANT ⟹201(3)—PERSONAL INJURY—FELLOW SERVANTS.

Plaintiff employé's recovery for personal injuries cannot be defeated because repairmen performing a nonassignable duty of defendant employer were negligent.

8 MASTER AND SERVANT ⟹226(1)—PERSONAL INJURY—ASSUMPTION OF RISK.

An employé assumes only risks incident to his employment, and does not assume those caused by his employer's negligence.

9. MASTER AND SERVANT ⟹293(2)—PERSONAL INJURY—INSTRUCTIONS.

Evidence in employé's personal injury case *held* to authorize instructions that it was defendant employé's duty to exercise reasonable care in providing a safe place to work, to furnish safe appliances, competent employés, proper inspectors, and that it was charged with notice of defects it might have discovered with ordinary care.

10. MASTER AND SERVANT ⟹293(11)—PERSONAL INJURY—INSTRUCTIONS.

In a servant's personal injury action, an instruction respecting the care required of defendant employer in protecting its machines, etc., *held* proper.

11. MASTER AND SERVANT ⟹289(23)—PERSONAL INJURY—INSTRUCTIONS.

In a servant's personal injury action, an instruction that plaintiff could recover if machine which caused a tool to break was in bad condition through defendant's negligence, and if it was not plaintiff's duty to inspect or repair machine, and if he did not know of its defects until he was passing it, etc., *held* proper under the facts.

12. MASTER AND SERVANT ⟹295(9)—PERSONAL INJURY—INSTRUCTIONS.

In a servant's personal injury action, instruction that an employé does not assume risk of an unsafe place while reasonably relying upon his employer's promise to remedy conditions *held* supported by the evidence.

13. MASTER AND SERVANT ⟹294(8)—PERSONAL INJURIES—INSTRUCTIONS.

In servant's action for personal injuries, an instruction that an employer, failing to perform a personal and nonassignable duty, was liable although a fellow servant's negligence also contributed to the injury, *held* proper.

14. TRIAL ⟹191(10)—INSTRUCTIONS.

In a servant's personal injury action, a requested instruction assuming that a fellow servant's negligence was sole cause of injury is properly refused, where evidence indicated that defendant employer's failure to inspect and repair a machine contributed to injury.

15. TRIAL ⟹252(11)—PERSONAL INJURY—INSTRUCTIONS.

In a servant's personal injury action, a requested instruction based upon theory that it was plaintiff's duty to supervise the inspection of

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machine which caused his injury was properly refused where evidence showed fact to be otherwise.

In Error to the District Court of the United States for the Eastern District of Virginia, at Richmond; Edmund Waddill, Jr., Judge.

Action by Moses L. Thornton against the American Locomotive Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The instructions mentioned in the opinion are as follows:

"(1) The court instructs the jury that it was the duty of the defendant company to use and exercise reasonable and ordinary care (1) to provide and maintain a reasonably safe place for the plaintiff to do the work which he was employed by the defendant to do; and (2) to exercise a like degree of care and diligence to furnish and maintain for its employés reasonably suitable, sound and safe machines, appliances, bits, and tools such as are reasonably calculated to provide for their safety, and to this end to inspect, test, and examine the same, from time to time, for the purpose of discovering any bad order, condition, or defect in them, and to repair the same so as to keep and maintain them in reasonably safe order and condition for use by the defendant's employés; and (3) to exercise a like degree of care to employ competent and careful men and employés to do its said work of inspecting, testing, repairing, using, and operating its said machines, appliances, bits, and tools in making shells, and near to which plaintiff was employed to work; and (4) to exercise a like degree of care to see that its said inspectors and repairmen did their said work in a reasonably careful and proper manner and way, and that these duties could not be assigned or delegated by the defendant to any of its employés so as to exempt defendant from liability for damages caused by the failure to perform said duties; and if the jury believe from the evidence in this case that the defendant company failed to exercise ordinary and reasonable care in the performance of any one or all of the aforesaid duties, and that such failure was the cause of the injury to the plaintiff, without negligence on his part, then the jury will find for the plaintiff.

"(2) The court further instructs the jury that the defendant is charged with notice not only with what it knew, but also of what it ought to have known by the exercise of ordinary care, foresight, and precaution on its part to inspect, examine, and discover the condition of the machine referred to in the declaration; and if the jury believe from the evidence that the said machine was in bad order and condition before and at the time Thornton was injured, and that the said defendant knew, or could have known, of its said bad order or dangerous condition by the exercise of ordinary and reasonable care on its part, in time to have repaired the same or warned the plaintiff thereof and prevented the injury, and that it failed so to do, and that such failure was the proximate cause of the plaintiff's injury, without negligence on his part, then the defendant is liable.

"(3) The court instructs the jury that if they believe from the evidence in this case that the defendant, in the exercise of ordinary care, ought to have put a guard or shield on its machine over the tool that broke and struck and injured Thornton, and that it was practicable so to have done to furnish reasonable and efficient protection to prevent it, in the event it broke, from being hurled against and injuring Thornton and its other employés employed and directed by the defendant to work around or near to said machine while said machine was being operated, and that defendant failed to do so, and that by reason of such failure the said tool, without negligence on Thornton's part, broke, struck and injured Thornton, while he was in the discharge of his duties and exercising ordinary care, then they should find for the plaintiff, unless they believe from the evidence that the dangerous condition which caused said tool to break was known and appreciated by Thornton, and was so great and imminent as to deter an ordinary prudent person from accepting the employment and doing the work Thornton was doing at the time he was injured.

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"(4) The court instructs the jury that if they believe from the evidence that the machine upon which the tool broke and injured Thornton was before and at the time of the injury being operated by an employé of the defendant other than Thornton, and that the tool broke because the machine, through the negligence of the defendant, was in bad order and condition, and that it was not Thornton's duty to inspect and repair said machine, and that he did not know, and in the exercise of ordinary care would not have known, that it was in such bad order until he was informed thereof by the operator of said machine while he was passing the machine just about or at the time the tool broke and injured him while he was exercising ordinary care and was in the discharge of his duties as an employé of the defendant and going by or passing said machine, then he is entitled to recover. This instruction is subject to the qualification set forth in instruction 3 given herein.

"(5) The jury are instructed that when an employé enters the service of the master he assumes all risk naturally incident to his employment, but the law does not mean by this accidents and injuries occurring from the failure of the master to use ordinary care and diligence in providing reasonably safe place and reasonably safe machinery and instruments for the use of the servant, and to use like care and diligence in providing such appliances as are reasonably calculated to provide for his safety, and the servant entering such service has the right to presume that the master has discharged his duty in this respect; and if an injury is occasioned to the servant because of the failure of the master to use ordinary care to provide reasonably safe and suitable appliances for his safety while in the discharge of his duties, and that such negligence on the part of the master, the plaintiff being himself in the exercise of proper care, was the proximate cause of the injury, the master is liable to the servant for damages, unless the plaintiff knew, or in the exercise of ordinary care ought to have known, of said defect in time to have avoided the injury.

"(6) The court instructs the jury that when an employé knows that the place in which he works is unsafe, and notifies the employer or his agent of such fact, and the employer or his agents promises to remedy such conditions, then the employé does not assume the risk of such unsafe place during the time reasonably required for the performance of the employer's promise, unless the danger is so imminent that no ordinarily prudent man would under the circumstances rely upon such promise and continue to do the work.

"(7) The court instructs the jury that if a servant was injured by the failure of the master to perform any of the personal and nonassignable duties which the law imposes upon him, as defined in instruction No. 1, such as exercising ordinary care, foresight, and precaution to provide and maintain reasonably safe machinery and appliances, etc., and such failure proximately contributed to cause the servant's injury, it is no defense for the master that the negligence of a fellow servant also contributed to or concurred in producing the injury, as in such case the master is liable as though he only was at fault."

"I-2. The court instructs the jury that if they believe from the evidence that the machine in use in this case was defective, nevertheless, if they further believe that the witness Ragland, who had been operating said machine, was told by Thornton, the plaintiff, not to operate it until it had been repaired, and that nevertheless Ragland did operate it, and that the accident and injury to the plaintiff resulted from this operation of the machine, the negligence which caused the accident was that of a fellow servant of the plaintiff, and they must find for the defendant.

"L-2. The court instructs the jury that it is their duty to try this case without being influenced by sympathy or the mere fact that the plaintiff was injured. You are under the solemn obligation of an oath to decide according to the law and the facts; and unless there is proof of negligence on the part of the defendant, and no proof of contributory negligence on the part of the plaintiff, or of negligence on the part of a fellow servant, such as to relieve the defendant of liability and as pointed out in other instructions, the plaintiff is not entitled to recover.

"M-2. The court instructs the jury that an employer may, by general rules, impose upon his employé the duty to supervise the inspection of the machin-

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ery under his direction, and of seeing to it that said machinery is kept in repair; and if the jury believe from the evidence that the machine in this case was defective or in need of repair, yet if they further believe that it was the duty of the plaintiff as foreman to see to it that the operators under him kept their machines running and in condition for work, and reported breakdowns or defects to the repair force or to himself, and that they reported to him any failure of the repair force to act within a reasonable time, and that, if the plaintiff had performed his duty in this regard, he would have known of the condition of the machine in time to avoid the accident, they must find for the defendant."

Murray M. McGuire, of Richmond, Va. (McGuire, Riely, Bryan & Eggleston, of Richmond, Va., on the brief), for plaintiff in error.

M. J. Fulton and R. E. Byrd, both of Richmond, Va., for defendant in error.

Before PRITCHARD and KNAPP, Circuit Judges, and CONNOR, District Judge.

PRITCHARD, Circuit Judge. This was a civil action instituted in the United States District Court for the Eastern District of Virginia, by Moses L. Thornton (who will be referred to as the plaintiff, such being the position he occupied in the court below), to recover damages for personal injuries which it is alleged he sustained by the negligence of the American Locomotive Company, defendant below.

It is alleged—

"that the defendant owned and operated a branch plant for manufacturing munitions and metal shells, and for that purpose it operated large and powerful machines, and employed thousands of hands daily; that among them it employed the plaintiff to keep the time and to see that certain of the defendant's employés, who operated certain of defendant's machines in making metal shells, kept busy at work during working hours, and to measure the length of such shells after they were taken out of the machines by the operators to see if the shells had been cut to the right length, and to sign orders for oil, etc., used by the operators in oiling its machines; that it negligently failed to provide and maintain in a reasonably safe condition and repair the machines, and especially one of them, which was then and there being operated by employés of the defendant other than the plaintiff, and that through its negligence the machine was worn out, defective, and in bad condition and repair in the following particulars:

"(a) That the rod against which the back end of the shells was pushed when put into said machine was so defective and badly constructed and so worn out that the set screw would not hold in place, and allowed the rod to slip away from the shell, and cause it to become loose and move up and down and to wabble;

"(b) And that defendant negligently allowed the clamp which went around the rear end of the said shell, when placed in the chuck of the said machine, to become worn out, loose, and defective, so that it did not hold the rear end of said shell tight, but allowed the shell to wabble and move, which it would not have done if said machine had been provided with a good and sufficient clamp;

"(c) That defendant negligently allowed said set screws or clamps on said machine to be and become loose, worn out, defective, and too short so that they did not hold such shell tight around its center;

"(d) That defendant also negligently allowed the head of said machine to become loose, and the said screws therein to become worn out, loose, and defective, so that the head of said machine in which the tool was fastened moved up and down while said machine was in operation;

"(e) That said defendant negligently allowed the clamp, which held the tools used to cut, face, and nose the shell, to become worn out, loose, and in

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bad condition, repair, and too large to fit the said tool or tools, so that the said clamp or jaws did not hold the said tools tight and stationary as they should have done;

"(f) That the defendant negligently undertook to have the said tools held tight by wedging the same in the jaws of said machine, and negligently failed to furnish fit wedges to its employés operating said machine for that purpose, and the said method of wedging said tools into the jaws of said machine was a negligent, dangerous, method and means of trying to hold said tools tight in said machine;

"(g) That defendant negligently failed to provide said machine with any safeguards or shield over said tools to prevent them, in the event they broke, from flying against and injuring the plaintiff, as the defendant should have done in the exercise of ordinary care, and was required to do under the safety appliance laws and statutes of the state of Virginia;

"(h) That said defendant negligently furnished unfit and dangerous tools to said employés operating said machine in that it furnished tools with square faced edges and points which would catch or gouge in said shells and cause said tools to break;

"(i) That defendant negligently failed to provide gauges to its said employé running its said machine to enable him to set said tools true and straight in said machine.

"That said defendant also negligently failed to employ competent inspectors, and failed to inspect or cause its said machine to be inspected from time to time for the purpose of discovering and repairing defects;

"That defendant also failed to employ competent men to repair said machine and its aforesaid parts and tools;

"That defendant negligently failed to see that its repairmen carefully repaired and kept in reasonably safe condition said machine and all its parts and that the said defendant, in the exercise of ordinary care, should have known of the incompetency of its said repairmen, and their failure to repair said machine, and all of its mechanical parts and appliances and caused said machine to be and remain in such worn out, loose, bad, and defective condition, and allowed and caused one of its employés, other than the plaintiff, to operate said machine while in such condition, when said defendant knew, or ought to have known, that to operate said machine in such condition was liable to cause the aforesaid tools to break, fly, and injure the plaintiff and its other employés, and that by reason of the aforesaid negligence said defendant caused the tools or one of the tools in said machine to break, strike, and put out the right eye of the plaintiff, without negligence on his part; and that the said defendant then sent the plaintiff to one of its doctors, and had the plaintiff's said injuries treated, and by reason of the aforesaid injury the plaintiff's other eye became infected, without negligence on his part, so that he has almost lost the sight in the other eye and is now almost blind."

It was for these injuries plaintiff sued to recover damages.

The defendant in its answer avers that it is not guilty of any one of the acts of negligence alleged by the plaintiff, or any act of negligence that caused the injury; that the machine in question was supplied with "every tool, fitting, and equipment needed for its operation; and that the same were available for use at any time," and the machine, and all its tools, fittings, and equipment, complied with every requirement of the general usage of the business of such work, were in good condition, and therefore not dangerous or worn out.

That every safeguard required by the laws of Virginia had been installed on the machine and were in use at the time of the accident.

Also that the methods employed at the shop at the time of the accident, as respects the operation of the machine, were those generally used among manufacturers in the same line of business; that the defendant exercised due care in the employment of competent men to

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inspect this machinery, including the particular machine in question, and did keep it in good condition, to assist operators, such as the plaintiff, in performing their duties, and that those thus employed properly performed their duties in respect to this machine, and were available before and at the time of the accident complained of, as was well known to the plaintiff; that the accident, as described in the declaration, was caused by the negligence of a fellow servant of the plaintiff; that the plaintiff was guilty of contributory negligence; that the injury complained of was caused by one of the risks assumed by the plaintiff when he undertook this employment with the defendant; that such risk was known to him, or could have been known to him, by the exercise of ordinary care, and by the exercise of such care he could have avoided any danger of injury.

The jury returned a verdict in favor of plaintiff, and judgment was entered accordingly. Defendant excepted, and the case now comes here on a writ of error.

The first assignment of error relates to the refusal of the court to direct a verdict for the defendant upon a motion made at the conclusion of the evidence introduced by plaintiff.

We think the ruling of the court as respects this point was proper:

[1] First, upon the ground that, after the court had considered the motion, defendant offered evidence on its own behalf.

In the case of Columbia & P. S. R. Co. v. Hawthorne, 144 U. S. 202, 12 Sup. Ct. 591, 36 L. Ed. 405, Justice Gray, in referring to this phase of the question, said:

"The question of the sufficiency of the evidence for the plaintiff to support his action cannot be considered by this court. It has repeatedly been decided that a request for a ruling that upon the evidence introduced the plaintiff is not entitled to recover cannot be made by the defendant, as a matter of right, unless at the close of the whole evidence; and that if the defendant, at the close of the plaintiff's evidence, and without resting his own case, requests and is refused such a ruling, the refusal cannot be assigned for error. Grand Trunk Railway Co. v. Cummings, 106 U. S. 700 [1 Sup. Ct. 493, 27 L. Ed. 266]; Accident Insurance Co. v. Crandal, 120 U. S. 527 [7 Sup. Ct. 685, 30 L. Ed. 740]; Robertson v. Perkins, 129 U. S. 233 [9 Sup. Ct. 279, 32 L. Ed. 686.]"

[2] Second, a careful examination of the evidence clearly shows that it is such that reasonable men might reasonably differ as to the inferences to be drawn therefrom; therefore it was very properly submitted to the jury for its determination; and this, in addition to what we have said, we think clearly warranted the court below in refusing to direct a verdict in favor of the defendant.

[3, 4] The second assignment of error relates to the refusal of the court to direct a verdict for the defendant made at the conclusion of all the evidence, and the fourteenth assignment of error challenges the action of the lower court in refusing to set aside the verdict of the jury as contrary to law and the evidence, and to award a new trial for the defendant.

We will consider these two assignments together in so far as they relate to the sufficiency of the evidence, and consider the other points in connection with the thirteenth.

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In disposing of this point it becomes necessary to determine as to whether the court below was in error in refusing to direct a verdict for the defendant upon the ground that there was not sufficient legal evidence to show negligence on its part; in other words, that the verdict was contrary to the law and evidence.

In the case of McDermott v. Severe, 202 U. S. 600, 26 Sup. Ct. 709, 50 L. Ed. 1162, the Supreme Court said:

"Negligence only becomes a question of law to be taken from the jury when the facts are such that fair-minded men can only draw from them the inference that there was no negligence; and if, from the facts admitted or conflicting testimony, such men may honestly draw different conclusions as to the negligence charged, the question is not one of law, but of fact, to be settled by the jury under proper instructions."

In the case of Carrington v. Ficklin's Ex'rs, 32 Grat. (Va.) 670, Burks, J., speaking for the court, said:

"When the question arises upon a state of facts on which reasonable men may fairly arrive at different conclusions, the fact of negligence cannot be determined until one or the other of these conclusions has been drawn by the jury. The inferences to be drawn from the evidence must either be certain and incontrovertible, or they cannot be decided by the court. Negligence cannot be conclusively established by a state of facts upon which fair-minded men may well differ."

This is the rule established by the Virginia decisions. Blosser v. Harshberger, 21 Grat. (Va.) 214; Blair & Hoge v. Wilson, 28 Grat. (Va.) 165; Jones v. Rixey, 79 Va. 656; Southwest Implement Co. v. Smith's Adm'r, 85 Va. 306, 7 S. E. 365, 17 Am. St. Rep. 59; Creekmur v. Creekmur, 75 Va. 431; Kimball & Fink v. Friend, 95 Va. 140–144, 27 S. E. 901; Chesapeake & Ohio Ry. Co. v. Williams, 108 Va. 689, 62 S. E. 796; Thompson v. Norfolk & P. Co., 109 Va. 733, 64 S. E. 953; Va. Fire & Marine Ins. Co. v. Hogue, 105 Va. 355, 54 S. E. 8; Brugh v. Shanks, 5 Leigh, 598; Marshall's Adm'x v. Valley R. Co., 99 Va. 798, 34 S. E. 455; Danville v. Robinson, 99 Va. 488, 39 S. E. 122, 55 L. R. A. 162; Bass v. Norfolk R. Co., 100 Va. 1, 40 S. E. 100.

The question presented is as to whether plaintiff's evidence tends to show that his injury was caused by the negligence of the defendant. In other words, was the negligence of defendant the proximate cause of such injury?

It is insisted by counsel for plaintiff (a) that the machine was defective; (b) that this fact was unknown to him, but was known or should have been known to the defendant; (c) that the machine should have been repaired or guarded by the defendant in the exercise of due care; (d) that the accident was due to the defendant's negligence.

The jury, after a thorough consideration of all the facts under instructions from the court, found in favor of the plaintiff.

Bearing on this point, witness Wilborn, who had operated this machine for several weeks anterior to the accident, and up to and within an hour of the time that plaintiff was injured, testified as follows:

That "he could not keep the shells tight in the machine. The men pulled the rods down to tighten the machine. but when it started up it would stop again and it would break the tools. The two top set screws were slick and

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worn out and would not hold the shells. He thought that on that morning the slide in front of the machine was loose. The set screw which holds it tight down on the slide was loose, and allowed the piece to rise up. This was loose when he left at twelve o'clock on the day when Thornton was hurt. There was something wrong with the set screws which held it tight in the slide; that caused the whole head to be loose and to rise up that held the tools. They had wedges in the tool that morning and in it all the time. The head which held the tools would rise up, and the whole head was loose that morning. He had wedged in that tool that morning and in it all the time he used wedges to hold the tool tight. The little shaft in the back of the machine would slip and not hold the rod in place. They would put the shell in and it would not hold the rod.

"Q. The set screw there was worn? A. The set screw there was worn, or else it would not have slipped; I do not know.

"Q. Let me ask you this: When you put the shell in there and that rod slipped, what effect would it have? A. Of course the shell would not have anything to hold it.

"Q. When the knuckles of this clutch were loose, what effect did that have on holding the shell tight? A. It had all; that was the main part. That would cause the shell to wabble and break the tool.

"Q. I want you to tell the jury how long the machine had been in that condition. A. I could not tell you how long. Some days it would run and again start and break the tool, and we would look out to see about it. I would ask the machinist to come and look after it.

"The machinist's name was Wilson, and witness had reported to him that morning that the machine was giving trouble and asked him to fix it. Wilson came up to the machine, and said he had no set screws to put in it, and he would get some as soon as he could. This was on the morning of the accident, and before Thornton was hurt. * * *

"Sometimes witness tried to fix it himself, and sometimes he would have to get the machinist, and sometimes the latter told him it was his own fault, that he did not have the tools in right. Sometimes they were bent, he said; sometimes they would get loose and break the tools. Shells can't be made if the tools are not right, and the repair man would say the trouble was in the tool and never said anything else was wrong. The last time the repair man told him this may have been that day. He did so several times, and if witness could not make it work he would go after machinist again. It was that same morning, a little while after the men went to work, that Wilson said he had no set screws to put in. The shaft (rod) in the back would slip, and witness reckons the set screws was loose."

"The operator would get tools from the toolroom which were not uniform as to length. Some were short and some were long. Sometimes one would bend and break; sometimes one good and one bad, and sometimes chip the corner off. The operator of the machine would go and get the tools. At that time the company would furnish the tools. It was hard to hold a short tool in the machine tight. The short tool would only go through the head of the machine to the center and would strip the threads of the studs. The tool would not break if it was a good one, properly set, and in good order and the shell held tight. Sometimes it would be loose. If machine was in bad order, and shell loose, or a bad tool, that would cause tool to break."

The plaintiff also introduced the witness Anderson, who, among other things, testified:

"That his machine was next to the one on which the plaintiff was hurt. They were a yard or a yard and a half apart. * * * That immediately after the injury to Thornton * * * that Mr. Peaco, the general foreman of that department, came and asked Anderson if he saw the accident, and Anderson told him that he did, and that Mr. Peaco then told him, 'The doctor wants to see you in the office; take the tool out of the machine and take it with you;' and that Anderson carried some of the pieces into the office and told the doctor how the accident occurred."

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We think it significant that the doctor who attended him was not called for the purpose of contradicting this statement.

In the same connection the witness testified:

"That he took the tools out of the machine, and that there was a piece of inch steel under the tool on the front side, and on the back there was a piece about as wide as witness' finger. * * *

"That when he examined the machine he found the screws on the end worked under the headblock loose and also the clutch. They had worn until you couldn't pull it up against the shell, but I do not care how tight you pull it when they get worn it will work loose, and that is what caused the back of the shell to run up. That he found wedges put in between the jaws of the headblock and the tool. The wedges were little pieces of sheet iron; the head, being loose, would cause the tool to slip and cut out into the shell."

He also testified:

"Two or three different parts of that machine were wrong. The clamps that came down on the shell and the set screws at the top were battered up. There was a wedge beside the headblock in the jaw, one on the side and one on top and at the bottom, and the operator had put one in the side to hold tool so as to come out straight with the other."

It clearly appears that the machine which caused the injury to the plaintiff was being operated by one of the employés, and the fact that Thornton had nothing to do with the operation of same is shown by this witness, who said that he was present and witnessed the accident, his testimony being as follows:

"Mr. Thornton came down the line, and when he got against this man (meaning the operator of the machine) said something to him. I did not understand what it was, and Mr. Thornton turned his head towards the machine, and then he turned and started down towards the line, and about that time the belt or something, * * * and he looked back, * * * and the tool on the machine broke and struck him in the eye, and the man operating the machine it struck him in the face, and he started down the runway."

"That there was no guard over the tool on the far side at the time * * * or hood to protect it from flying in the event it broke. A shield was put on afterwards."

Plaintiff also introduced John H. Cousins, who, among other things, said:

"That he was working for the company on a machine next to the one on which Thornton was hurt, and was facing the machine and saw the accident to Thornton. The man operating the machine said something to Thornton which witness could not hear. Thornton spoke to the man and pointed towards the machinist. Thornton started down the runway towards the drillers, and the machine made a creaking noise, and Thornton looked back to see what was going on, and the tool broke and a piece must have struck him. When Thornton came up and started to pass the machine it was running and there was a shell in it. He was there only a few seconds before he was hurt. He was a yard or a yard and a half away from the machine at the time it struck him in the eye."

"He stopped to talk to a man, and Mr. Anderson was operating the machine on the other side of this machine. Mr. Wilborn had been trying to operate this machine all the morning. * * *

"At the time of the accident the shell must have been loose and the tool on the far side gave way. It was a tool which cut the shell. The shell slipped and that caused the tool to give way. * * * After the accident a man put in new set screws and new studs, either that evening or the next day. The set screws were worn up to the shoulder, and you could not make

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them any tighter; they would not on this machine. Mr. Wilborn had been trying to operate it and it would not come down on the shell. Q. Witness does not think the studs were strong enough—that is, the down on the tool? A. Yes, sir.

"The set screws were worn out up to the shoulder. Can't say how long they had been worn; wearing a little every day."

The witness Dodson, who did not see the accident, was introduced by plaintiff, and, among other things, responded to questions that were propounded to him as follows:

"Q. What would cause the tool to break in the machine? A. We had set screws working on the front of the shell and the clamp in the middle and the nose end, and when one got loose it would loosen all the others and it would break the tool. If all the parts of the machine were in good order and the machine in good shape they did not break the tools."

He also testified:

"That if the machine was in good condition and set screws and clamp tight, and he took too big a cut, it would loosen the tool but not break it. * * * It would loosen the set screws and the clamp, but could not break the tool if the machine was in good condition."

It is insisted by counsel for plaintiff that, in addition to the testimony above quoted, such testimony as respects the failure of the company to inspect this particular machine so as to discover and repair defects therein, or to furnish an inspector for that purpose, is corroborated by much of the testimony offered by the defendant.

The witness Peaco, on behalf of defendant, in testifying, among other things, in reply to questions asked him on cross-examination, said:

"Q. You told the jury on Saturday that that was his (plaintiff's) duty? A. Yes, sir.

"Q. But it was not his duty to go and examine the parts of the machine? A. Of course not. It was no one's duty to examine the parts of the machine.

"Q. You had no one down there to do that? A. No, sir; we haven't any one to examine all parts of the machines."

This witness refers to the defects which caused the injury and of which it appears the defendant had actual notice. This evidence was very material to one of the issues involved; that is, as to whether the defendant had negligently failed to provide the machine in question with safeguards "or shields over said tools to prevent them, in the event they broke, from flying against and injuring the plaintiff, as the said defendant should have done in the exercise of ordinary care, and was required to do under the safety appliance laws and statutes of the state of Virginia," as alleged in the declaration.

C. W. Glaze, who was also introduced by plaintiff, testified:

"* * * That he was not sure whether there was any guard on the machine at the time the plaintiff was hurt. Guards were put on afterwards to prevent the tool from flying when it broke, and some of the operators left them on the machine."

This evidence was corroborated by Peaco, who, as we have stated, was introduced by defendant, who testified that—

"There was no guard over the knife and no guard had been put on those machines for the knives. Since that time there may have been one or two,

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but up to the time of the accident and after that for quite a while there were no guards on them at all."

E. C. Wilson, who occupied the position of repairman and machinist, was introduced by defendant, and among other things testified:

"That he saw guards put on several machines, fitted over said screws on the top, and extended over the tools. Supposes the guards were meant to prevent the tool from flying when breaking, but he cannot say positively, as this did not come under him, could not state the size of the guards. There were no guards on before the accident."

Kirkman, another repairman employed by defendant, testified as follows as respects this question:

"Kirkman and Jones made these shields and put them on the heads of the machines after Thornton was hurt. Jones made the suggestion that this be done, so that when the tool broke up it would not fly."

C. W. Nicholas, another witness for defendant, testified:

"* * * That there were no guards over the tool when Thornton was hurt. They were put on afterwards."

The witness Jones, who was a member of the defendant's safety committee, also testified, among other things, as follows:

"That he did not know there was a plate on the machine marked, 'Stop this machine before repairing, oiling, wiping, or adjusting work and when through for day. Guards must not be removed under penalty of law.' He did not know that guards came with the machine to go over the tool, and that they were not put on because it took more time to put shells in and out and to fit the tools with the guard on. Witness made these guards to go over the tools for all sixteen of the machines. * * * It had been witness' practice ever since he was around a machine shop to put up little pieces of sheet iron to keep chips from flying, and this was his own suggestion. Witness thought probably if tool broke it would keep it from flying off through that part of the shop. * * * It would hit that little piece of sheet iron up there and come down. * * * Witness put them on because he thought it was the proper thing to put there to keep the tool from flying if it broke."

M. F. Pollard, another witness for defendant, testified that he did not know that the statutes of Virginia required guards or shields to be used over tools on shapers and planers and this kind of machine, and that the defendant "did not use guards over the tools on shapers, planers, and other like machines, and that the tool on this machine was similar to those used on lathes."

In referring to what occurred when the tool broke on the planer he said:

"That if tool broke on planer it would have a tendency to fly just the same as if a tool broke on this machine."

Mechanical Superintendent Julius Kindervater, witness for defendant, in referring to a machine of this character, said:

"That on a machine of this kind the work revolves and the tool is stationary in cutting. If the tool were to break, the particles would be liable to fly whether it be a lathe, planer, or shaper, and if the tool on this particular machine were to break the particles would fly in any direction—you can't tell where it is going. The danger from the breaking and flying from tools is the same as on a lathe or planer, and on any cutting machine they are apt to fly, but do not always do so. Witness has seen them nip off and drop

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down, and has seen them fly upwards, sideways, and in any direction, and the danger from the breaking of tool on a lathe, shaper, or planer is substantially the same as on this machine, and the conditions are substantially the same on all of these cutting tools so far as the danger from broken tools is concerned."

This is a very accurate and intelligent statement as to the danger of breaking a tool on a lathe; and he further makes it clear that a shaper or planer is subject to the same conditions, and that such machines are liable, on account of broken tools, to injure those employed in and about them while in operation.

This machine was exhibited at the time the case was argued, and from an examination of the same it appears that it is very important to keep it in a workable condition by having the screws, etc., in perfect condition.

Witness Pollard, in referring to this question, said:

"That these rods were put in by the manufacturers with the intention of stopping the shells, but the company did not use them for that purpose at all."

It clearly appears that the screws were out of order and would not hold the shells in their proper place when being operated.

The testimony on this point is corroborated by witness Wilborn, who testified on behalf of defendant. He had operated the machine in question until 12 o'clock on the day on which the injury was sustained, and in referring to its condition said:

"That he could not keep the shells tight in this machine because the two top set screws were slick and worn out and would not hold the shells; the slide in front of the machine was loose * * * and allowed the piece to rise up. There was something wrong with the set screws which held it tight. They had wedges in the tool that morning and in it all the time. The little shaft in the back of the machine would slip and not hold the rod in place. The set screw there was worn or else it would not have slipped, and that when you put the shell in there, and that rod slipped, the shell would not have anything to hold it; and that he notified Wilson, the machinist, that morning, and that Wilson had come up to the machine and said he had no set screws to put in it, and told witness to make out with it and he would get some as soon as he could. This was on the morning of the day Thornton was hurt."

It should be borne in mind that Thornton at the time of his injury was not operating this machine. It appears that he was about a yard or a yard and a half away, passing in front of the machine, when the tool which injured him, owing to its defective condition, broke, and the flying piece struck him in the eye. A number of witnesses testified that the tool never broke when the machine was kept in proper condition.

Witness Wilson, who, as we have said, testified for the defendant, in referring to what might or might not have happened in the operation of the machine, said:

"The tools would sometimes break from gouging the shell. If they were set properly, and if they made too big or deep a cut, they should not break if the chuck was tight and true. The tool would not break if set tight, and if set loose it would move back. * * * When the tool broke it was invariably because of a loose shell, but there may be other causes, and the witness could not say what they are."

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It appearing that Thornton was not operating the machine and had no hand in the management of the same, and it further appearing that the injury sustained by Thornton was due in a large measure to the negligence of the company in its failure to provide a machine that was in workable condition, the defendant is liable, notwithstanding the fact that Ragland, Wilson, and Kirkman, who, as we have said, were repairmen, may have been negligent in a measure and contributed thus to the injury.

In the case of Grand Trunk Railroad Co. v. Cummings, 106 U. S. 700, 1 Sup. Ct. 493, 27 L. Ed. 266, the Supreme Court said:

> "If the negligence of the company * * * had a share in producing the injury" of the deceased, "the company was liable" notwithstanding "the negligence of a fellow servant" contributed to the happening of the accident.

Also in the fourth syllabus of the case of Deserant v. Cerillos Coal Railroad Co., 178 U. S. 409, 20 Sup. Ct. 967, 44 L. Ed. 1127, is the following language:

> "It is the master's duty to furnish safe appliances and safe working places, and, if the neglect of this duty concurs with that of the negligence of a fellow servant, the master is liable."

These cases are very much in point, and clearly sustain the court below in refusing to set aside the verdict of the jury upon the ground that it was contrary to the weight of the evidence.

[5-8] It is further insisted by counsel for defendant that, notwithstanding the fact that defendant was guilty of negligence, plaintiff is not entitled to recover, because (a) it was his duty to have discovered the defects in the machine, and he failed to do so; (b) that the injury resulted from the negligence of Ragland, Kirkman, and Wilson, all of whom were fellow servants of Thornton.

In view of the facts of this case, these contentions are untenable.

The plaintiff had a right to assume that defendant had provided and was maintaining safe machinery and appliances. As we have said, it clearly appears that it was not the duty of the plaintiff to inspect and ascertain the condition of the machinery, nor was it his duty to repair any defects that might exist. There is nothing surrounding the transaction to show that the duties he performed were such as to give him anything like an accurate knowledge as to the actual condition of the machine at the time he was injured.

As we have stated, Peaco, a witness for defendant, testified:

> "It was no part of Thornton's duty to set tools. * * * It was not Thornton's duty to repair machines or tools."

Witness Wilson also testified that he had seen plaintiff set tools, but had "told him that the tool setter was there, and it was none of his (Thornton's) business, and said to him, 'Why don't you call him to set tools?' "

The following question propounded by the court, and the response thereto, clearly show that neither plaintiff nor any one else except the safety committee was required to inspect machines.

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The Court: "Did they have an inspector there for that?"
Witness: "No, sir; no inspector but the safety committee; that is the only one."

C. A. Smith, witness for defendant, testified that he was employed by the company while plaintiff was there, and was acting as "foreman of the drill pressers, which were looked after by himself and plaintiff; * * * that after the accident he took Thornton's place on both jobs; that he was required to act in the capacity in which plaintiff had theretofore acted, and that his duties were identical with those that had been required to be performed by plaintiff." In describing the extent and character of his duties, he said:

"If he (witness) knew a machine was broken down, it was his duty to tag it, but he would only know this if the operator reported it. It was not witness' duty to inspect the machine, but if one was reported by the operator to be broken down witness would report to the repairman."

The testimony of this witness corroborates that of plaintiff respecting this matter.

Wilborn, witness for plaintiff, also testified as follows:

"The machinist's name was Wilson, and witness had reported to him that morning that the machine was giving trouble and asked him to fix it. Wilson came up to the machine and said he had no set screws to put in it, and told witness to make out with it, and he would get some as soon as he could. This was on the morning of the accident and before Thornton was hurt."

"When a machine was out of order, the system or way the company let the operator know it was out of order was the machinist put a card on it to show it was not to be used. This was done by machinist, and witness had seen the machinist put the card on. If the machine had no card on it, it was supposed to be in running order. Q. If there was not any card on the machine, what did you understand with reference to the use of it? A. We went ahead and started it up."

We think it is clearly established that it was not plaintiff's duty to repair machines of this character.

Witness Anderson, testifying on behalf of plaintiff, said:

"No one but the repairmen were allowed to do repair work on the machines. It was against the rules. If anything got wrong the men had to go and report to Mr. Wilson. They could not tighten up the screw. It was against the company's orders, and the set screw which goes through the rear of the machine to hold the rod in place had battered up around the rod so that every time you put the shell in it, it would go back two or three inches. The operators worked on it for a long time, Mr. Wilson fixed it, and the only way he did it was to cut the whole thing out and put in a new set screw."

It appears that immediately after the accident Anderson, under the direction of Peaco, took the broken tool out of the machine, both of whom testified they had not observed the same, inasmuch as they had not examined the machine.

If those whose duty it was failed to discover such defects, it is unreasonable to insist that plaintiff had knowledge of the same, upon the theory that such defective parts were so open and obvious that plaintiff could have observed such defect. As we have stated, the machine was exhibited at the time of the argument, and inspection showed that some of the defects of which complaint is made were such as not to be observable upon a casual glance, but some of them could only

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be discovered by close examination, and this is especially true as to the set screws required to hold the machinery in a stable condition.

It further appears from the testimony of Wilborn that the condition of the machine had not been reported to plaintiff and that in the absence of such knowledge the plaintiff, finding no card placed thereon, instructed Ragland to operate the same at 12 o'clock on the day on which the accident occurred.

We think it is perfectly clear that this accident would not have happened had it not been for the failure of the defendant company to inspect and keep in repair the various parts of the machine in question.

The contention that Wilson and Kirkman were fellow servants of the plaintiff is unsound, because it clearly appears that they were repairmen, and as such were performing one of the nonassignable duties of defendant, and that their failure to properly inspect and repair the machine was the negligence of the company.

The rule is clearly stated in the case of Northern Pacific Railroad v. Peterson, 162 U. S. 346, at page 353, 16 Sup. Ct. 843, 845 (40 L. Ed. 994), where it is said:

"The general rule is that those entering into the service of a common master becomes thereby engaged in a common service and are fellow servants, and prima facie the common master is not liable for the negligence of one of his servants which has resulted in an injury to a fellow servant. There are, however, some duties which a master owes, as such, to a servant entering his employment. He owes the duty to provide such servant with a reasonably safe place to work in, having reference to the character of the employment in which the servant is engaged. He also owes the duty of providing reasonably safe tools, appliances, and machinery for the accomplishment of the work necessary to be done. He must exercise proper diligence in the employment of reasonably safe and competent men to perform their respective duties and it has been held in many states that the master owes the further duty of adopting and promulgating safe and proper rules for the conduct of his business, including the government of the machinery and the running of trains on a railroad track. If the master be neglectful in any of these matters, it is a neglect of a duty which he personally owes to his employés, and if the employé suffer damage on account thereof the master is liable. If, instead of personally performing these obligations, the master engages another to do them for him, he is liable for the neglect of that other, which, in such case, is not the neglect of a fellow servant, no matter what his position as to other matters, but it is the neglect of the master to do those things which it is the duty of the master to perform as such."

See Northern Pacific R. R. Co. v. Herbert, 116 U. S. 642, 6 Sup. Ct. 590, 29 L. Ed. 755; Northern Pacific R. R. Co. v. Charless, 162 U. S. 359, 16 Sup. Ct. 848, 40 L. Ed. 999; New England R. Co. v. Conroy, 175 U. S. 323, 20 Sup. Ct. 85, 44 L. Ed. 181; Martin v. Atchison, etc., R. Co., 166 U. S. 399, 17 Sup. Ct. 603, 41 L. Ed. 1051.

As we have stated there was evidence tending to show that the company had not employed an inspector. This was a circumstance which the jury undoubtedly had a right to take into account in passing upon the question as to whether the defendant was negligent.

The contention that it was the duty of Wilson to repair this machine is borne out by the fact that he had been notified of its condition by the witness Wilborn on the morning of the accident. If he had performed this duty by making proper inspection and placing a card

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thereon, plaintiff would not have sustained the injury of which he complains.

However, it is insisted by defendant's counsel that plaintiff was negligent in not wearing goggles. The witness Jones testified that "foremen didn't generally wear goggles because they were not doing the work, but superintending it."

In view of the evidence, we are of opinion that the doctrine of assumed risk does not apply to the case at bar, inasmuch as it clearly appears that the defects that caused the accident were latent, and could not have been discovered without a thorough examination of such defects, and that these defects were due to the negligence of the defendant in not inspecting and keeping the machine in proper repair. It has been repeatedly held that an employé only assumes such risks as are incident to his employment, and that he does not assume risks occasioned by the negligence of defendant. This rule is too well established to require citation of authority.

[9] The defendant insists that the court below erred in granting instructions 1 and 2 in favor of plaintiff. The same objection applies to both these instructions.

In view of the evidence, a large portion of which we have quoted, we feel the court was warranted in granting these instructions.

[10] We are of opinion that defendant's contention as to instruction 3 is not well grounded, and that the rule announced by the court as to the degree of diligence required of defendant was proper in view of the evidence offered as to this phase of the case.

[11] In considering instruction 4, it should be borne in mind that it appears that it was not the duty of Wilborn to inspect this machine; that he was an operator, and had not been notified that the machine was not in workable condition. It further appears that the moment he ascertained its condition he reported to Wilson, who, as we have stated, was charged with the duty of making a proper repair of the same. When it was reported to him it appears that he examined the same; but instead of instructing Wilborn to cease operations until it could be properly repaired, he contented himself by saying to Wilborn that he had no set screws and that he must make out with it until he could secure them and make the proper and necessary repairs. This duty being nonassignable, defendant cannot relieve itself of liability by claiming it was the duty of an operator to inspect the machine, it being a duty which defendant owed the employés to employ competent persons for this character of work. It clearly appears that the operators were not qualified to make the inspection, and they certainly were not permitted to do so, for reasons that are obvious; and it further appears that Wilson, who was charged with the duty of repairing machines, told Wilborn to proceed to operate it. Under these circumstances, the negligence of Wilson, he being a vice principal, was the negligence of the company. The instruction is clear and comprehensive, and plainly states the law bearing upon the facts as established in the court below, and we think was eminently proper.

The objection to instruction 5 is of the same import as No. 3, and, as we have said, there being sufficient evidence upon which to predi-

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cate instruction 3 as to the guards or shields, such is equally true of No. 5.

[12] It is insisted there is no evidence upon which to base instruction 6, "and that it has no bearing on the case, and that it is misleading, even though it be a correct statement of the law in a proper case."

This instruction is predicated upon the testimony of the plaintiff, who, among other things, said that—

"* * * Four or five days or a week before the accident men had complained to him that Mr. Wilson was not doing his work properly and was incompetent, and that he had reported it to Mr. Peaco, who told him to report to Mr. Richardson and tell the latter that Peaco said to repair the machines and get them going. Plaintiff did this, and Richardson seemed to be fretted, and said he had no man to put on the job. 'You go ahead and attend to your work and I will attend to mine. I will have them repaired for you, and I go back to my duty and keep the men at work."

Thus it appears that Richardson, machinist and foreman, when informed as to the dangerous condition of the machine, contented himself by simply inviting plaintiff to go ahead and continue in the performance of his duties around and about these machines, and that he would have them repaired, instructing plaintiff to "keep the men at work at them." The evidence indicates that Wilson on that occasion was wholly unmindful of his duty, and that he was not actuated by a desire to protect those engaged in this hazardous undertaking, and one can imagine under these peculiar circumstances the helpless condition of the plaintiff, whose livelihood depended upon his employment, and who knew if he refused to work he would in all probability be promptly discharged.

In view of the conduct of Richardson, who commanded the employé to go ahead with the work, instead of making the necessary repairs, as it was his duty to do, thereby leaving the machine in an unsafe condition, it would be manifestly unfair to exonerate defendant by holding that plaintiff was injured by his own negligence and that he assumed the risk incident to his employment.

[13] We will content ourselves by saying that in our opinion defendant's contention as to instruction 7 is without merit.

It is insisted that the court below erred in not granting the instruction I-2. This instruction is based upon the theory that Ragland was a fellow servant of the plaintiff. Having already disposed of this question adversely to the contention of defendant, we do not deem it necessary to enter into any further discussion of the same than to say that we think the action of the court in refusing to grant this request was eminently proper.

[14] We will now consider Instruction L-2, which the court below refused to grant.

This instruction is based upon the theory that Ragland's negligence was the sole and proximate cause of the injury. The evidence clearly shows that the proximate cause of the injury was not due to the negligence of Ragland. On the other hand, it clearly appears that the injury of plaintiff was due to the failure of defendant to use ordinary prudence in properly inspecting and repairing the machine which Ragland was operating under the direction of his superior. It must be

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admitted that, if the machine had not been in a defective condition, plaintiff would not have sustained the injury of which he complains. We think the court very properly refused to grant this instruction.

[15] It is insisted by counsel for defendant that the court erred in refusing to grant instruction M-2. This instruction is based upon the theory that "it was the plaintiff's duty to supervise the inspection of the machinery," which we think is an erroneous assumption, inasmuch as there is a total absence of evidence to sustain such contention. On the other hand, it appears that the operators were not required to repair machines, and were not even permitted to engage in this kind of work, as we have said; and, even if it had been so required, no tools or necessary materials were furnished them for that purpose; therefore we can conceive of no theory in the light of the evidence to warrant the court below in granting an instruction of this kind.

We have carefully considered the cases relied upon by the defendant to sustain its contention, but an examination of the same show that the facts upon which they were decided are not analogous to the case at bar, and that the rule invoked by the defendant does not apply in the instant case. Here we have numerous facts and circumstances which, considered as a whole, clearly show that the employment of the plaintiff was rendered exceedingly hazardous, not on account of any fault of his, but primarily due to the failure of defendant to use ordinary prudence in inspecting and keeping in proper repair the machine in question. The defendant, having failed to perform its duty in this respect, was negligent, and it cannot relieve itself by attempting to place the blame on a fellow workman who was operating unsafe and defective machinery, the condition of which was occasioned by its own negligence, in order to defeat the right of plaintiff to recover damages for injury he sustained.

Therefore we are impelled to the conclusion that the rulings of the lower court are proper, and the judgment should be affirmed.

(259 Fed. 423)

GAS SECURITIES CO. v. ANTERO & LOST PARK RESERVOIR CO. et al.*

(Circuit Court of Appeals, Eighth Circuit. May 13, 1919.)

No. 5158.

1. COURTS ⟹322(3)—JURISDICTION OF FEDERAL COURT—ALLEGATION OF CITIZENSHIP.

An allegation in a bill of the citizenship of a corporation carries with it that of the citizenship of its directors, where they appear in the suit only as representatives of the corporation.

2. INJUNCTION ⟹114(3)—NECESSARY PARTIES—DEFENDANTS.

Where a bill asks no relief against a person but that defendants be restrained from interfering with his performance of a contract which it is alleged he is able and willing to perform, he is not a necessary party defendant.

3. WATERS AND WATER COURSES ⟹230(4)—ISSUANCE OF BONDS BY IRRIGATION DISTRICT—TRUST FUND.

Where the owners of arid lands have organized an irrigation district under a statute, and the district has issued and sold to the public its ne-

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⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Certiorari denied 250 U. S. 667, 40 Sup. Ct. 13, 64 L. Ed. —

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gotiable bonds, which are a lien on the lands therein, there is a definite obligation on its part to devote the proceeds to the irrigation of the lands, creating a trust relation between the district and its bondholders, which trust the latter may enforce in equity.

4. WATERS AND WATER COURSES ⟹230(4)—IRRIGATION DISTRICTS—TRUST RELATION TO BONDHOLDERS.

Under Colorado Irrigation Act, § 3452, providing that the title to all property acquired under its provisions shall vest in the irrigation district, and shall be held by it in trust "for the uses and purposes set forth in this act," a district cannot, after using some of the funds acquired from the sale of bonds in the prosecution of a plan of irrigation, as against its bondholders abandon all plans of irrigation.

5. SPECIFIC PERFORMANCE ⟹74—CONTRACTS ENFORCEABLE—CONSTRUCTION CONTRACTS.

Under some circumstances a court may decree specific performance of a construction contract.

6. SPECIFIC PERFORMANCE ⟹17—PERSONS ENTITLED TO ENFORCE PERFORMANCE —INTEREST IN SUBJECT-MATTER.

Bondholders of an irrigation district *held* entitled to enforce specific performance of a contract between the district and a third party, who was willing to perform, where its abandonment by the district would defeat the purpose for which it was organized, and leave the bondholders without security.

7. SPECIFIC PERFORMANCE ⟹12—DEFENSES—BREACH OF CONTRACT.

A party to a contract who aided and abetted actions by others which were the sole cause of a breach of contract by the other party cannot urge such breach as a defense to a suit for specific performance.

8. ESTOPPEL ⟹62(6)—IRRIGATION DISTRICT—CONTRACTS.

An irrigation district which has sold bonds and expended the proceeds in execution of a contract for an irrigation system which is nearly completed is estopped to set up the invalidity of the contract in a suit by its bondholders to require it to complete the contract.

Elliott, District Judge, dissenting.

Appeal from the District Court of the United States for the District of Colorado; John A. Riner, Judge.

Suit by the Gas Securities Company against the Antero & Lost Park Reservoir Company and others. Decree for defendants, and complainant appeals. Reversed.

Platt Rogers, of Denver, Colo. (James Grafton Rogers, of Denver, Colo., on the brief), for appellant.

L. F. Twitchell, of Denver, Colo. (Goudy, Twitchell & Burkhardt and Owen & Clark, all of Denver, Colo., on the brief), for appellee Antero & Lost Park Reservoir Co.

Hubert L. Shattuck, of Denver, Colo. (I. B. Melville and Max D. Melville, both of Denver, Colo., on the brief), for appellee East Denver Municipal Irrigation Dist.

Before SANBORN and STONE, Circuit Judges, and ELLIOTT, District Judge.

STONE, Circuit Judge. This is an action in equity by appellant, owner of bonds of the East Denver Municipal Irrigation District, against the Antero & Lost Park Reservoir Company, the Antero Land & Irrigation Company, the East Denver Municipal Irrigation Dis-

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trict, the Interstate Trust Company, the Colorado National Bank, and the members of the board of directors of the irrigation district, as such and individually. To this bill two separate, but identical, motions to dismiss were filed, one by the Reservoir Company, and the other by the irrigation district and the members of the board of directors of the district. These motions were sustained, and the bill dismissed generally. From this order the Gas Company appeals. The question thus presented is the vulnerability of the bill to the attack of the motions to dismiss.

The cause of action alleged by the bill is as follows: That prior to October, 1909, the Reservoir Company was the owner of an irrigation system consisting of the Antero reservoir, having a maximum storage capacity of 85,600 acre feet, with a feeder ditch and (through ownership of the entire capital stock of the Northern Colorado Irrigation Company) of the Highline Canal, about 70 miles long, with certain priority water rights; that for the purpose of effecting a sale of this property the Reservoir Company during that year conceived the plan of having formed an irrigation district to which the property might be sold for the bonds of such district; that in pursuance of that plan it brought into being the Land Company, a corporation, which it thereafter procured to organize the irrigation district, and to make with the district a contract by which the above property, together with such work as might be necessary to complete the same for the uses of the district, was to be exchanged for bonds of the district; that the district was so organized; that on August 30, 1910, the Land Company, with the approval and on behalf of the Reservoir Company, for the purpose of making a sale of the above property of the Reservoir Company, contracted with the district to deliver to it a complete irrigation system for $3,000,000 of the bonds of the district; this system, as required by this contract, consisted of the Antero reservoir, which was to be improved by increasing its storage capacity to 71,000 acre feet, and by facing its dam with concrete; the Highline Canal, which was to be enlarged and extended; construction of a system of distributing laterals (including rights of way therefor), and construction of a system of two distributing reservoirs within certain survey sections, with a capacity of 9,000 and 4,000 acre feet, respectively. As to the method, time, and conditions of payments, the contract provided that upon filing by the Land Company of a bond for $100,000, securing the performance of its contract, the entire bond issue of $3,000,000 would be deposited with the Continental Trust Company as trustee, to be paid out by it as follows: $1,125,000 (less amount required to improve the Antero reservoir under the contract) upon delivery to the trustee of a warranty deed conveying the Antero reservoir, $675,000 upon delivery to the trustee of the entire capital stock of the Northern Colorado Irrigation Company, $32,500 upon delivery to trustee of warranty deed conveying the Irondale reservoir; all of the above three payments being subject to deduction of 10 per cent., to be withheld until the entire system be completed, and accepted; the balance to be paid on estimates of the construction work, except, apparently, certain retained percentages, all final sums to be

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paid 90 days after completion of the work. There was also a provision fixing, for estimation purposes, the values of facing the Antero reservoir and constructing the Abbott and Terminal distributing reservoirs, and providing that, if either of these distributing reservoirs should not be completed and conveyed according to the specifications, the estimated cost of such completion, with 15 per cent. retained, should be returned by the trustee to the district, but that the district should still have a right to damages on the bond. The bill further alleges that the bonds were authorized to be payable in series from 1921 to 1930; that during the negotiation of this contract, upon demand of the board of the district, the Reservoir Company, by two resolutions which it delivered to the district, approved said contract, and agreed to carry out the contract in so far as it related to things to be done or not to be done by it, and that it would negotiate a contract with the directors of the district for the carriage of water storage in the Tollgate reservoir; that, in accordance with the contract, the bonds were delivered to the Interstate Trust Company (substituted for the Continental); that no bond was made by the Land Company; that thereafter, because of difficulties in placing the bonds, as represented by the officers of the Reservoir and Land Companies, the contract was altered by another dated August 29, 1912, whereby $250,000 in bonds were delivered in payment of certain rights of way, water rights, and filings for the purpose of completing by January 1, 1913, the extension of the Highline Canal and laterals, as provided in the earlier contract, so that water might be rented by the district and used upon the lands during the completion of the system, and an extension for completing the entire system was made to January 1, 1914; that the work provided for by the contracts was not done by the Reservoir or Land Companies, but that they induced one Fred L. Lucas to undertake the completion, on their behalf, of the contracts; that pursuant to this arrangement three contracts of different date, but forming part of the same transaction, were made: one (December 14, 1912) between Lucas and the Reservoir Company, by which he was to pay $250,000 cash and $1,000,000 of district bonds for warranty deed to the district of the Antero reservoir and all the capital stock of the Northern Colorado Irrigation Company ($50,000 cash on or before January 15, 1913, when the deed and stock would be placed in escrow until the irrigation system as contracted for should be accepted by the district, and the remaining $200,000, due on or before January 15, 1915, and the stock paid over); another (December 30, 1912) between Lucas and the Land Company, assigning to him the two contracts with the district, and obligating him to complete the work with any modifications thereafter entered into; a third (February 4, 1913) between Lucas and the district (as represented by the board of directors), consenting to the above assignment, and modifying the prior construction contracts by providing that in lieu of the Abbott and Terminal reservoirs (combined capacity 13,000 acre feet), he should increase the contracted capacity of the Antero reservoir by 14,600 acre feet; that these contracts between Lucas and the district and Lucas and the Land Company were known to and agreed to by the Reservoir Company; that

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February 4, 1913, Lucas paid the Reservoir Company the $50,000, and thereafter it placed the deed and capital stock in escrow with appellee the Colorado National Bank; that Lucas entered upon the Antero reservoir and Highline Canal, and proceeded with the work required by his contract until 90 per cent. had been fully performed; that the unperformed portion was almost entirely work to be done on the Antero reservoir; that during the progress of this work the district delivered to Lucas thereon $673,500 in bonds; that during this time bonds for $10,000 each for purchase of the Abbott reservoir and Terminal reservoir sites were paid to the owners thereof, and bonds for $20,000 were paid for a ditch and water rights from Plum creek, these latter bonds, being a portion reserved under the contract on account of the elimination of the Abbott and Terminal reservoirs, were delivered to H. G. Clark, president of the Reservoir Company, who then knew that said Abbott and Terminal reservoirs were not to be constructed; that from about October 1, 1913, the Reservoir Company has excluded Lucas from its properties (where the unfinished work was to be done), and has prevented him from completing his contract; that this action of the Reservoir Company was prompted by an opportunity to sell its said property to better advantage to another purchaser, the city of Denver; that in pursuance of such design, in disregard of its contractual obligations and without attempting any cancellation of such obligations, it attempted to dispose of those properties, and was prevented only by suit brought by strangers to this action; that, because of these acts of the Reservoir Company, Lucas has been prevented from completing the work and delivering it to the district, and from performing his contract with the Reservoir Company, although he is and has always been able, ready, and willing to do so; that there is no other source of irrigation of these lands which, without irrigation, cannot pay the outstanding bonds, and earn the interest thereon; that, long prior to the interference of the Reservoir Company, appellant purchased, in due course, district bonds amounting to $628,500, with attached coupons, which remain wholly unpaid, with no effort by the district or its officers to pay same; that at all times it was understood by the district, Reservoir Company, and Land Company that the proceedings authorizing the issue of the bonds were public proceedings, which would show that the bonds were to be paid for a completed system of irrigation, and therefore they combined to give to the purchaser of such bonds in the open market the assurance that they were issued and negotiated upon the basis of an irrigation district, with a completed system of irrigation comprising the Antero reservoir and Highline Canal, with the extensions and enlargements thereof necessary to the irrigation of the district; that the district has failed, neglected, and refused to compel the performance of said contracts, to restrain the Reservoir Company from interfering with Lucas, to perform its contract and escrow agreement, or to acquire funds to care for the bonds and interest, but, on the contrary, has aided and abetted that company in interfering with Lucas, and that it is in default to its bondholders; that the bondholders are the only sufferers through these defaults, and by reason of the neglect and re-

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fusal of the district to secure said irrigation system to said district there is no relief except for equity to compel all of said defaulting parties "to specifically perform their several obligations and contracts, and granting such other or different relief as may be appropriate, and plaintiff avers that the said Lucas is ready and willing to keep and perform all the obligations assumed by him, and to do all things necessary to entitle said district to a conveyance by said Reservoir Company of the irrigation system agreed to be conveyed to said district."

The prayer of the bill is:

(a) To restrain the Reservoir Company from interfering with Lucas in completing the system "in accordance with his several contracts with said irrigation district and said Reservoir Company and said Land Company."

(b) "That upon the completion of said system the said district and the said Interstate Trust Company be required to deliver to said Reservoir Company or to said Lucas, to be by him delivered to said Reservoir Company, the said $1,000,000 in the bonds of said district, and that upon the delivery of said bonds, and the payment of the balance of said $250,000 due to said Reservoir Company by the terms of its contract with the said Lucas, and as stated in the escrow agreement of said Reservoir Company, that the said Reservoir Company be ordered and decreed to specifically perform its obligations to convey to said district the said Antero reservoir and the said Highline Canal by delivering to said district the said deed of said Antero reservoir, and the said assignment of the stock of the Northern Colorado Irrigation Company as deposited in escrow with the said Colorado National Bank."

(c) To restrain the Reservoir Company from altering its title to the property here involved.

(d) "That in the event that by reason of the acts and doings of the said district and the said Reservoir Company and the said Land Company, either acting jointly or severally, the said Lucas shall be unable to complete said system or to pay said balance of $250,000, that the said Reservoir Company be ordered and decreed to deliver to said district the deed heretofore executed by it, conveying the said Antero reservoir, and its assignment of the stock of the said Northern Colorado Irrigation Company, or, if such instrument should be destroyed, then that a like deed and assignment should be made and delivered to said district."

(e) To restrain the bank from delivering the deed or stock to other than the district until further order.

(f) To restrain the district from interfering with Lucas or declaring him in default by reason of interference from the Reservoir Company, to annul any such proceeding, and command performance of its contract with Lucas.

(g) General relief.

Summarized, in a very general manner, the bill sets forth, as grounds for relief, that appellant is the holder for value of bonds based upon the completion of the irrigation system under a contract which would have been performed but for wrongful acts of the Reservoir and Land Companies (abetted by the district), and the annihilation of value of those bonds unless those companies and the district are compelled to desist from such wrongful acts and thus permit the performance of the contract. The relief sought is the restraint of the continuance of such wrongful acts, the maintenance of the status quo so that the contract may be fully performed, and the compulsion of performance on the part of the companies, district, and Trust Company.

The propositions insisted upon in the motions to dismiss are:

(1) No proper showing on the face of the bill of diverse citizenship.

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(2) Absence of necessary parties defendant, Lucas, the city, and the county of Denver.

(3) Lack of equities enforceable in this action or in the manner here sought.

(4) Lack of privity of plaintiff in the contract to enforce specific performance.

(5) No showing of injury to appellant by matters alleged in the bill.

(6) The relief sought would require the substitution of the discretion and management of the court for that of a municipal corporation.

(7) This character of contract will not be specifically enforced because such enforcement would require supervision, and injunction will not be granted where specific performance would not be enforced.

(8) No proper showing of legal, proper, or sufficient tender or offer of performance or efforts creating a right of action.

[1] 1. The challenge of jurisdiction, as a federal court, on the ground that the necessary diversity of citizenship is not shown, is based upon the fact that the citizenship of the individual defendants constituting the board of directors of the district is not alleged. Although in the title or style of the case they are named "individually and as constituting the board of directors" of the district, no complaint is made in the body of the bill of any act as individuals, and no relief is asked against them as such. There is the clear allegation of citizenship of the district as a Colorado municipal corporation. This allegation carries the citizenship of directors where they appear in the suit only as representatives of the corporation. Thomas v. Board of Trustees, 195 U. S. 207, 25 Sup. Ct. 24, 49 L. Ed. 160.

[2] 2. The objection of lack of necessary parties is based upon the theory that Lucas, the city of Denver, and the county of Denver have interests which would be so affected by the determination of this controversy as to make it necessary that they be brought into it. As to Lucas the allegation is that he is ready and desirous of proceeding with his contract, no relief is asked as to him, and no order which could properly be based upon the bill could affect him other than by permitting him to do what the bill alleges he wishes to do. He is not a necessary party. The connection of the city of Denver, as shown by the bill, is that it was the purchaser to which the Reservoir Company sought to convey its property here involved. When the Reservoir Company halted Lucas in the performance of the irrigation system contract it negotiated a contract of sale of its property to the city of Denver for bonds of that city, and in pursuance thereof delivered to the city a back-dated deed to such property. The bill then alleges that, "immediately upon the making of said contract between the city of Denver and the said Reservoir Company, one Frank L. Birney, for himself and other freeholders and taxpayers of said city of Denver, instituted an action in the district court of the said city and county of Denver to restrain the carrying out of said contract, and the taking possession by said city of said properties

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under said deed of conveyance, and the delivery of the bonds of said city or the proceeds thereof to the said Reservoir Company, the said Birney alleging in the complaint filed by him, among other things, that said properties had already been agreed to be conveyed to said irrigation district by said Reservoir Company, and that said agreement was in full force and effect, and that by reason thereof the said city could not obtain title to said premises, nor could it obtain any consideration for the bonds proposed to be delivered to said Reservoir Company." The result of that litigation, as alleged in the bill, was that after hearing it was, in August, 1916, adjudged that the said contracts of the said Reservoir Company with the said district and the said Lucas were in full force and effect, and that the said Reservoir Company could not convey good title to the city until the rights of said district and the said Lucas and all other rights growing out of said contracts had been disposed of, and the city was restrained from purchasing said properties and from delivering its bonds to the said Reservoir Company. The bill alleges that by reason of said judgment the said Reservoir Company is now in the ownership and possession of said "property." The above determination of the litigation effectually removed any interest the city of Denver might have, so far as shown by this bill, in the present controversy. The county of Denver is not mentioned in the bill, and we have not been enlightened as to any possible interest it might have in this suit. The conclusion is therefore that the bill reveals no defect in parties.

The remaining grounds of the motions of the Reservoir Company to dismiss are presented by it as based upon the propositions following: (1) That specific performance of these contracts cannot be enforced by appellant because (a) it is a third party to them; (b) it does not ask subrogation to the rights and duties of Lucas thereunder; (c) the contract is of a class requiring supervision, and (d) there exists a complete legal remedy; (2) the theory of enforcement of a trust cannot prevail because no such relation exists; (3) there is no right to compel the completion of any specific system of irrigation improvements.

The district separately urges, in addition, that the contract of February 3, 1913, between it and Lucas is not binding because not authorized nor ratified by the electors of the district, but that even if valid that contract was not performed, since it provided that the system should be completed by January 1, 1914, which was not done, and time was of the essence of the contract.

While not abandoned here, the claim that there is a clear, adequate legal remedy was not vigorously pressed. It has no merit. The levy of taxes against arid land or the sale of that land cannot, under the allegations of this bill, make appellant whole. It alleges that its only salvation is the procurement of the security of the lands under irrigation—that the arid lands as sole security leave its bonds valueless.

[3] Consideration of the grounds of the motions to dismiss requires, first, a definition of the legal relation between the parties and

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the determination of their respective interests, rights, and duties; and, second, separate examination of some of these grounds. Appellant contends that it is the beneficiary in a trust wherein the district is trustee; that the execution of the trust requires the installation of an irrigation system; that the district had contracted for such a system, which incorporated the only available water supply for irrigating the district; that, when this system was near completion and about ready for delivery, the Reservoir and Land Companies, aided and abetted by the district (trustee), prevented such completion and delivery; that to permit such prevention will result in loss to the district of the only supply of water available for irrigating the district; that the trustee district refuses, and will continue to refuse, to prevent this result, which means the destruction of valuable property rights of appellant, a beneficiary. This trust status is denied by appellees. The circumstances, as shown in the bill, and their legal results we deem to be as follows: The district has put forth an issue of bonds payable "to bearer," and obviously intended for a negotiable security to be purchased by the investing public. It thus invited investment and promised security therefor. What security did it thus assure such investors should protect such investments? The bonds state upon their faces that they are "a lien upon all the real property in said district." Does this mean merely the arid, unirrigated, almost valueless land, or does it mean the land as made productive and valuable through a scheme of irrigation projected by the district? The difference is vital to all parties concerned. It was known by all parties to be the vital consideration in the minds of the bond-buying public. That public was not buying arid land nor loaning money upon such land as security. The landowners were contemplating no such transaction. They were given statutory power to form an irrigation district for no such purpose. They, planning the improvement of their low-priced lands, sought to borrow money for that one specific object, and offered such lands thus improved by that money as security for its repayment. The statute permitted them to organize a municipal corporation for the sole purpose of furnishing a convenient vehicle for the one purpose of making such improvements through funds so acquired. For no other purpose could they organize such a district; for no other purpose could they issue bonds of the district; for no other purpose could they expend the proceeds from the sale of such bonds. The object of being of the district is single and definite; its life work clearly outlined; its obligations to those who purchase its bonds clouded by no uncertainty. Suppose that after selling its bonds the directors and electors of the district should honestly change their views, and decide that the bond money could be better employed in building schools or roads therein, would the bondholders be powerless to intervene? When they have parted with their money upon the definite understanding that it will be used in a prescribed manner to increase, if indeed, not practically to create, their security, have they no right to prevent its diversion and practical loss to them which they can enforce in the courts of the country? The inquiry furnished its own answer. There remains the definition of the bound-

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aries of this interest and right. The clear intention of the parties, acted upon by the bondholders through purchase of the bonds, creates a relation of trust. The terms of this trust are that the district will invest such funds in the irrigation of the lands in the district.

[4] The Irrigation Act (R. S. Colo. 1908, § 3452) provides that—

"The title to all property acquired under the provisions of this act shall immediately and by operation of law vest in such irrigation district, in its corporate name, and shall be held by such district in trust for, and is hereby dedicated and set apart for the uses and purposes set forth in this act."

These "uses and purposes" cannot be realized from such "property" unless the district construct or purchase therewith and thereafter maintain a system of irrigation. The district may have power to abandon all schemes for irrigation before any of this trust fund has been used. It may, subject to existing contract rights, have power to alter any such plans at any time it may, in its discretion, deem such alteration advantageous to the general object of the irrigation of the lands. But it certainly cannot, after expenditures from such funds in the prosecution of a plan of irrigation and while it has outstanding obligations, abandon *all* plans for irrigation. To do this would totally defeat the trust to the injury of the beneficiary where, as here alleged, it would leave the bonds valueless. Equity has ample power to protect the interests of beneficiaries. It has been held by the Court of Appeals for the Ninth Circuit that directors of irrigation districts organized under statutes practically identical with those here involved are trustees for the bondholders as to money collected from landowners to pay interest upon such bonds. Thompson v. Emmett Irr. Dist., 227 Fed. 560, 566, 142 C. C. A. 192.

While the above ground of equitable jurisdiction is sufficient for all purposes, it may be suggested that to permit the action of the appellees of which complaint is here made would border upon, if it did not enter, the domain of constructive fraud.

The general principle that where one has received money to be applied to a particular purpose he is liable to interested parties, as a trustee, for a diversion or misapplication thereof is illustrated by Taylor v. Benham, 5 How. 233, 274, 12 L. Ed. 130.

But it is objected here that such protection would entail the supervision of construction work and that such burden courts cannot and will not assume. The bill presents no such problem. Lucas had already finished 90 per cent. of the work satisfactorily when prevented for reasons in no way relating to the manner in which he was performing his contract. He is ready and willing to continue to completion in accordance with the contract. No relief is due, under the bill, unless the contract is properly performed. The appellees may protect themselves in that regard under the terms of their various contracts with Lucas. The only mandatory relief asked, even after full satisfactory performance by Lucas, is the delivery of deeds and bonds already placed in escrow for the very purposes asked in the bill.

[5] While the contract here was one of purchase of a completed irrigation system, appellees have treated it in respect to specific per-

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formance as though it were a construction contract. Even so regarded, it may be noted that specific performance of a construction contract may be decreed. Wheeling Traction Co. v. Board of Commissioners of Belmont County, 248 Fed. 205, 160 C. C. A. 283; Board of Commissioners of Mattamuskeet Drainage District v. Wills & Sons (D. C.) 236 Fed. 362, 380.

[6] As illustrating the rights of bondholders to have specific performance of a contract between third parties and the bondmaker when the performance of the contract would affect the security back of the bonds, see Brown v. Guarantee Trust Co., 128 U. S. 403, 9 Sup. Ct. 127, 32 L. Ed. 468.

It is also urged that to grant the relief asked would be to control the supervision and discretion of the officers of a municipal or public corporation. The supervision by such of the construction work is not sought to be constrained in the slightest. With no lawful exercise of discretion is any interference asked. Under the allegations of the bill, the only discretion sought to be exercised by the district is to abandon, without cause, not only the existing contract for an irrigation system, but to do so under circumstances which it knows will result in definite loss of the only water supply available for the irrigation of the district. In short, it seeks to abandon all irrigation of the district at a time when the completed system is almost ready to be delivered, and when such action would render worthless the irrigation bonds in which it had induced appellant, as one of the public, to invest. The district has no discretion to commit an unlawful act to the injury of others.

The district contends that it should not be compelled to abide by the existing contract for the two reasons, that it has been vitally breached because not performed within the specified time, and because it never was binding upon the district since not ratified by the electors.

[7] As to the first contention little need be said. No matter how vital may be a breach of a contract, it furnishes no shield to one who, as here alleged, "has aided and abetted" the very actions which are solely responsible for that breach. The law permits no one to profit by his own wrong. As to the contention that the contract between Lucas and the district is not binding, the allegations of the bill and the governing statutes of Colorado concerning irrigation districts (of which we take judicial notice) reveal the following situation: Those statutes provide two ways in which an irrigation district may secure an irrigation system. It may contract for the doing of the work for the district (R. S. Colo. 1908, §§ 3450, 3455, 3462) or it may contract for the delivery of a complete system of irrigation (same, sections 3450, 3455).

If it adopts the former plan, it must secure public bids for doing the work and follow certain other requirements. If the latter plan, a different procedure is prescribed. The original contract with the Land Company, the creature of the Reservoir Company, was of the latter class, for the purchase of a complete system. It was executed in pursuance of the statutory requirements for that character of contract; it was stated in the contract itself that it was of that nature and

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all parties agree that such it was. The Lucas contract with the district was one of assignment of that contract as to the unperformed portions, with the changes following:

"It is further agreed that, in lieu of the Abbott and Terminal reservoirs which the said Lucas is by this contract released from constructing, the said Lucas will complete the Antero reservoir to the maximum storage capacity of thirty-six feet vertical height against the dam, at which height the capacity of the reservoir, according to the contour survey made under the supervision and certified to by the state engineer of the state of Colorado, is 85,600 acre feet."

The effect of this change was to release Lucas from any obligation imposed upon him to construct and deliver the Abbott and Terminal distributing reservoirs, and obligate him to increase the capacity of the main Antero reservoir without compensation additional or different from that provided in the original contract. The original contract provided for the separate valuation, for estimation purposes, of the Abbott reservoir at $205,000 and the Terminal reservoir at $120,000, and provided, as alleged, "that in the event that one or more of the said distributing reservoirs should not be completed or conveyed according to specifications, then that not less than the estimated cost of completing the same in bonds at par should be withheld by the trustee and returned to said district, together with the 15 per cent. retained on the work of said reservoir, it being understood, however, that the withholding of said bonds and the return of the same to the district should not operate as a waiver or satisfaction in full of any damages by the plaintiff to construct and convey any one of said reservoirs, and that the Land Company should be liable on its $100,000 bond for such damages." After the contract with Lucas was executed the bonds provided for reservation in the preceding quotation were set aside, and $20,000 of those so reserved thereafter expended by the district for sites for the Abbott and Terminal reservoirs. It is evident that the original contract contemplated and provided specifically for a failure to construct and deliver these two distributing reservoirs. Clearly such failure, under the above provision, was no such breach as to justify a refusal of performance of other provisions or rescission of the contract by the district. This Lucas contract was executed by the board of directors of the district. The powers of such a board are very great.

"The board shall have power, and it shall be their duty, to * * * manage and conduct the affairs and business of the district, make and execute all necessary contracts, * * * and generally to perform all such acts as shall be necessary to fully carry out the purposes of this act; * * * to construct, acquire or purchase any and all canals, ditches, reservoirs, reservoir sites, water, water rights, rights of way or other property necessary for the use of the district. * * * But no contract involving a consideration exceeding ten thousand (10,000) dollars, and not exceeding twenty-five thousand (25,000) dollars shall be binding, unless such contract shall be authorized and ratified in writing by not less than one-third of the legal electors of said district. * * *" R. S. Colo. 1908, § 3450; also see section 3451.

[8] There is nothing in the bill revealing that this Lucas contract was not entirely within the power of the board. A further consideration is present: that of estoppel of the district or the landowners

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from urging such a defense against bona fide bondholders for value, where the allegations are that they have induced the investment, permitted the use of the proceeds in this very contract, and allowed the contract to continue for their benefit until almost fully performed, paying out large amounts of such bonds thereon. Tulare Irrig. Dist. v. Shepard, 185 U. S. 1, 19, 22 Sup. Ct. 531, 46 L. Ed. 773.

The petition is subject to none of the objections carried by the motions to dismiss. The judgment dismissing the petition is therefore reversed, and the case remanded for proceedings not inconsistent with this opinion.

Reversed.

ELLIOTT, District Judge, dissents.

(259 Fed. 435)

OTTO MARMET COAL & MINING CO. v. FIEGER-AUSTIN DREDGING CO.*

(Circuit Court of Appeals, Sixth Circuit. June 3, 1919.)

Nos. 3182-3184.

1. COLLISION ⟹71(3), 74, 75—FAULT—DREDGE ANCHORED IN CHANNEL.
A dredge working in the Ohio river *held* grossly negligent in anchoring at night, with her assistant flats, in the middle of the towboat channel at a dangerous bend, when she had knowledge that a coal fleet was coming down, and in fault for a collision with one of the tows, not only because of the place of anchorage, but also for failure to maintain lights, as required by the rules, or to take any other precautions. The tow *held*, on the evidence, not chargeable with contributory fault.

2. COLLISION ⟹145—MUTUAL FAULTS—DIVISION OF DAMAGES.
When both vessels are in fault for a collision, the damages are to be equally divided, without regard to whether their faults were equal in degree.

3. COLLISION ⟹123—ACTIONS—BURDEN AND MEASURE OF PROOF.
Where the fault of one vessel for collision is clear, and is sufficient to account for the collision, she has the burden of establishing the contributory fault of the other vessel by equally clear evidence.

4. COLLISION ⟹73—MOVING AND ANCHORED VESSELS—PRESUMPTION OF FAULT.
The rule that, in case of collision between a moving and an anchored vessel, the moving vessel is presumed to be in fault, does not apply where the anchored vessel was clearly in fault.

5. COLLISION ⟹78—ABSENCE OF LOOKOUT—PRESUMPTION OF FAULT.
Conceding that in general the absence of a lookout raises a presumption that an ensuing collision was caused or contributed to thereby, such presumption is disputable.

Appeals from the District Court of the United States for the Western Division of the Southern District of Ohio; Howard C. Hollister, Judge.

Suit in admiralty for collision by the Otto Marmet Coal & Mining Company, owner of the steamboat Sallie Marmet, against the Fieger-Austin Dredging Company, owner of the dredgeboat Northern No. 2,

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⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Certiorari denied 250 U. S. 668, 40 Sup. Ct. 13, 64 L. Ed. —.

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with cross-libel. From a decree dividing damages, both parties appeal. Reversed on libelant's appeal, and affirmed on respondent's appeal.

Charles H. Stephens, Sr., of Cincinnati, Ohio, for libelant.

Lowrie C. Barton, of Pittsburgh, Pa., for respondent.

Before WARRINGTON and DENISON, Circuit Judges, and COCHRAN, District Judge.

COCHRAN, District Judge. [1] The litigation involved in these appeals grew out of a collision in Manchester chute of the Ohio river, about 73 miles above Cincinnati, near midnight, September 1, 1914, between the towboat Sallie Marmet and her tow, consisting of 13 barges loaded with coal and two flats, owned by the Otto Marmet Coal & Mining Company, which was descending the river, and the dredging plant of the Fieger-Austin Dredging Company, consisting of the dredge Northern No. 2, two flats and scow, which was anchored therein. Each party claimed that the other was in fault and sought damages for the injuries sustained. The lower court held both to have been in fault and divided the damages between them. Each party has appealed from its decree.

The chute is formed by two islands in the river, just above Manchester, Ohio. One, between 1⅓ and 1½ miles long, and called Manchester Island, hereafter referred to as the Island, lies next the Ohio shore. The other, between one-third and one-half miles long and called the Towhead, lies between the upper end of the Island and the Kentucky shore. There is no navigation on the Ohio side of the Island. At the then stage of the water, there was none running between the Island and the Towhead. They were connected by a sand bar. All navigation is next the Kentucky shore, except that in very high water passage may be had between the two islands. It is the portion of the river between the Kentucky shore, and first the Towhead, and then the Island, that is known as Manchester chute. This portion thereof is crooked, narrow, and swift. It has three bends. Two are formed by its course around the Towhead. Above, as you descend, the channel turns to the left—i. e., towards the Kentucky shore—and hugs it, until it gets somewhat below the middle of the Towhead, when it turns to the right and runs towards the Island, around the foot of the Towhead. The latter bend is characterized by the witnesses as a very deep bend, and is caused by a rock or gravel bar extending from the Kentucky shore out into the river. The third bend is caused by a sand bar, which puts out from the lower end of the Island, beginning not far from its middle. The channel here turns to the left, or towards the Kentucky shore, and after hugging that shore for a short distance, when below the Island it turns to the right, or towards the Ohio shore, forming a fourth bend opposite the wharfboat at Manchester. The uncontradicted testimony is that this chute is a very bad place for boats, and particularly towboats, with tows, to navigate. It is the worst place on the Ohio river between the mouth of Kanawha river, the point whence the Sallie Marmet started, and Cincinnati, its destination.

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The dredging plant was anchored in about the middle of the river, about opposite the middle of the Island, about 1,200 feet below the Towhead. One witness puts it that it was at the foot thereof. It was not far from, if not right at, the beginning of the third bend; i. e., the place where the channel turns to the left, or the Kentucky shore, because of the sand bar putting out from the lower end of the Island. One flat, a repair flat, was on the Kentucky side of the dredge. The other, a fuel flat, and scow, lying tandem, were on the Ohio side. The stern of the dredge was up river. The width of the dredge and two flats was 68 feet, and the length of the fuel flat and scow 176 feet, which was considerably greater than that of the dredge or repair flat. The distance from the north side of the plant to the water's edge at the Island was 400 feet, and from its south side to such edge at the Kentucky shore was 380 feet, thus making the width of the river at this point 848 feet. The width of the navigable water does not appear.

The dredge was engaged in removing the rock bar, heretofore referred to. It began so to do August 28th, and had been so engaged for four days. It had made two cuts, each about 30 feet wide and over 200 feet long up and down the river, and had nearly completed the third cut. The material so removed was mainly sand, and it was about to enter upon the rock bar, if it had not already done so. The dredge was over the outer edge of the rock bar. There was a rise in the river, just when it began not appearing. The stage at Portsmouth, Ohio, 30 or 40 miles above, was 9 feet 8 inches. The depth over the rock bar where the dredge was located was 8 feet 7 inches, and to the north or the Island side thereof it was 15 feet 4 inches. The dredge was not at work at the time of the collision. It did not work at night. It had a single white light on the upper end of the fuel flat—i. e., on the Ohio side of the dredge—and another on the lower end of the scow. The former could not be seen from below, nor the latter from above. There was no light on the dredge or repair flat on the Kentucky side. The lights were placed on the Island side, because the deep water was there. The work was being done under a contract with the United States, and there was on the dredge at the time a government inspector, Capt. Howard, who supervised the work. The night was a bright moonlight night.

The rise in the river was sufficient to permit Kanawha coal to be transported from the mouth of that river to Cincinnati, and a fleet of tow boats, with tows in charge, took advantage of it. They began to pass through the chute the evening of September 1st, and by 9 o'clock the next morning 7 at least so passed; the Sallie Marmet being the third. They passed in this order: Florence Marmet, J. T. Hatfield, Sallie Marmet, D. T. Lane, Convoy, Dewey, and Matheson 2d. They all seem to have had substantially the same size of tow, though the evidence discloses nothing as to the Convoy and Dewey. The Florence Marmet passed about 9:30 and the J. T. Hatfield about 10. The Leader, a towboat without a tow, passed about 7 p. m. The Leader and the Florence Marmet passed the dredging plant on the left or Kentucky side, and the J. T. Hatfield on the right or Island side. When the others passed, the plant had been removed to the Kentucky shore. A barge of the Sallie Marmet sunk, straight up and down

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the river, about 235 feet below where the plant had been and 25 feet nearer the Island. The others passed to the left or Kentucky side of this barge. The Eugene Dana Smith with a tow passed on the morning of September 3d, and it, too, passed to the left, or Kentucky side of the barge. The Leader with a tow of 6 empties passed up on the morning of August 28th, after the plant had been placed, and so did the Val P. Collins with a tow of 14 empties late in the afternoon of August 31st. Each passed to the left or Island side of the plant.

The tow of the Sallie Marmet was arranged in four tiers. The first was composed of three barges and one flat, the latter being on the right or Island side, then the next two of four barges each, and the fourth, next the boat, of two barges and a flat. The barges were 26 feet wide and 126 feet long. This makes the tow 104 feet wide and 504 feet long. The length of the boat does not appear. It is not unlikely that it was sufficient to make the entire length as much as, if not more than, 650 feet. The draft was 6 feet. In the collision the flat in the first tier struck the repair flat of the plant, and the outer barge of the second tier, which was sunk, the dredge. It is likely that, if the repair flat had been removed when it became apparent that a collision was about to take place, it might have been avoided.

In determining who was to blame for the collision, the natural order calls for a consideration first of the part of the operators of the dredging plant in the transaction. The claim is that they were at fault in anchoring at that place at night, and our conclusion is that they were not only at fault in so doing, but grossly so. As heretofore stated, that place was about in the middle of the river. The middle of the river was 6 feet from the Island side of the dredge. It was, however, exactly where, at that stage of water, towboats with tows run; i. e., in what may be termed, as it was by some of the witnesses, the towboat channel. This is established by the testimony of 11 experienced pilots, who saw the dredging plant whilst it was so located, 9 of whom were on the Val P. Collins, Leader, Florence Marmet, J. T. Hatfield, and Sallie Marmet, and 2 of whom were on the Sea Lion, a towboat operated in connection with the dredging plant, then tied to the Kentucky shore, not far away, and 5 other experienced pilots, whose attention was called to its location on the witness stand, and there was no testimony to the contrary.

The claim in behalf of the operators of the dredging plant is that the deep water channel was on the Ohio side thereof. This was undoubtedly the case. But the question here is not where the channel was in extreme low water, when towboats with tows could not navigate; but where did they run when the water was of sufficient height for them to navigate—i. e., where was the towboat channel? And as to that, as stated, it is conclusively established that it was exactly where the dredging plant was located. It is further clearly established by the testimony that the location of the dredging plant at this point endangered the safety of each of the towboats and its tows, which had to pass whilst it was there. It made it a "dangerous maneuver" for a towboat with such tows as these had to attempt to pass it on either side. In passing on the Island or deep water side, two turns were called for, first to the right and then to the left, and the danger was

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that in crossing to the Island side, the current would draw the tow or boat down onto the plant, and that, if this danger was escaped, the tow would strike the bar on the lower end of the Island and break it up. In order to make this passage, as one witness puts it, a "very good twister" was needed. The danger in going to the left was two-fold: Of being drawn on to the plant by the current, and of the water over the rock bar not in all places being of sufficient depth to permit passage. Whilst the plant was so stationed the Leader and Val P. Collins in passing up took the Island side, and in passing down the J. T. Hatfield took the same side, and the Leader and the Florence Marmet took the left or Kentucky side. The Sallie Marmet attempted to take the same side; and all the towboats passing afterwards took the left or Kentucky side of the sunken barge. This would seem to indicate that the location of the dredging plant created a difference of opinion amongst the pilots as to which was the best side upon which to make the passage.

On behalf of the operators of the dredging plant it is urged that the right or Island side was the proper side to take, and that there was no risk in taking it. Such was the view of the operators themselves, shown by their placing the lights on that side of the plant. But it is not impossible that they added to the confusion by so doing, and that it would not have been better had they contented themselves with so lighting up the plant that it, and what it was, could be readily discovered, and left it to the experienced pilots, who were thoroughly familiar with the situation, to determine as to the best course to pursue. No doubt, from the distance of the dredging plant to the foot of the Towhead and Island shore and the size of the Sallie Marmet and her tow, it can easily be made out that there was room enough for her to get around that way, and that with comparative safety. But the determination of the risk, if any, incurred in making the attempt to so do, is not entirely a matter of ciphering. The qualities of the boat and her tow, the skill of the pilot, the effect of the current, how soon it was discovered that the plant was in the way of the usual course, and possibly other things, had much to do with the risk so incurred. That the dredging plant endangered the safety of the towboats and their tows would seem to have been the opinion of nearly all of the experienced pilots heretofore referred to. There was no substantial testimony to the contrary.

Besides, the effect which the condition of things there existing had upon those who were confronted with it leaves no room for doubt that such was the case. The two pilots in the pilot house of the Val P. Collins, as she with her empties passed up on the Island side the afternoon of August 31st, the day before the collision, discussed between themselves that the dredging plant was in the way, and some one from her hallooed to those on it that they had better get out of the way; that a fleet of Kanawha coal was coming, and that they would get run over. The tow of the Collins passed within 4 or 5 feet of the plant. The pilot of the Leader, as she passed at 7, the evening of the collision, tried to get the window of the pilot house open in order that he might halloo and tell them to get out of the way, as boats were coming down that night, and, either because he could not get

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the window open sufficiently or get to his horn in time he was unable to do so, and he thought he heard some one from below halloo that they had better get out of the way, as a lot of boats were coming down that night. Two pilots were in the pilot house of the Florence Marmet as she passed between 9 and 10 o'clock p. m., son and father; the former being at the wheel. The son had a "whole lot of hard feelings" before he got to the plant, and did not know whether he was going to hit it or not. In deciding to go on the Kentucky side, as he gives it, he said to his father, "Father, I don't believe that I can go to the right," and, according to his father, "Pap, we will go down the left there; I expect we will rub, but I will take the chance." And after they had passed he said that they had better get that dredge-boat out of there, for they are liable to get hit with the towboats coming. The tow passed within 25 feet of the plant, and, as the boat got alongside, the son hallooed and told the persons on the dredge that they had it right square in the channel. They said that the channel was on the Ohio side, where the lights were. He replied that it might be for a packet, but not for a towboat, and that they had better get the dredge out of the way, for the rest of the boats were coming, all towboats, to which they responded that they were not in the channel. The pilot of the J. T. Hatfield, which passed on the Island side, gave as his reason for so doing that he was afraid the drift of the water might slide him to the side of the dredge. He passed within 30 or 40 feet. The dangers of the situation scared him. He came to the opinion that some boat was going to hit the dredge where it lay, and so remarked. He thought he was going to strike his whole tow on the Island bar, and had to back three or four times to keep from so doing, and then had to drive so far over to the Kentucky shore, that he could not land a barge which he had for Manchester, without going half a mile below and then towing it back. The pilot of the Sea Lion, late the afternoon of September 1st, when it had been ascertained from the Cincinnati Enquirer that the coal fleet was coming, and he was asked by Capt. Howard for his advice as to whether they should move out of the way, said, "Why, sure I would, for she is right in the way."

There is no accounting for this effect on these experienced pilots of this condition of things, except that the passage of the towboats with their tows was rendered decidedly unsafe by the location of the dredging plant. The operators of the dredging plant knew that this fleet of tow boats with tows was coming in ample time to have gotten out of the way. They ascertained it from the newspaper, at least as early as the late afternoon before the collision. Two of the fleet, to wit, the Florence Marmet and J. T. Hatfield, passed before the Sallie Marmet's turn came. They must have observed the close proximity to the plant in which the tows came, which passed before the collision, and the difficulty which the J. T. Hatfield had in getting by, in passing on the Island side. The Leader, when it passed up on the morning of August 28th, with her 6 empties, on the Island side, also had difficulty in getting by, which also must have been observed. It had to go above the plant, then back, and then throw her head around, in order to get across. However it may have been as to the warning given

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from the Val P. Collins as it passed up the late afternoon of August 31st, and from the Leader early in the evening of the collision, the evidence justifies the conclusion that they were aware of the warning to get out of the way given by the pilot of the Sea Lion, late in the afternoon of the collision, and that given by the pilot of the Florence Marmet shortly before. After the latter warning was given there was ample time to have gotten out of the way. The plant could have been moved either by the Sea Lion or by her own steam.

There was no reasonable necessity for the dredging plant to remain where it was during that night, when it was not at work. Indeed, it may be said that there was no reasonable necessity for its being at work there whilst this coal fleet was passing. At most it would take but two days for it to get by. But, however this may be, there was no reasonable excuse for its remaining there, if not at work, whilst this fleet was passing. The only excuse offered is that it would have been difficult to find the place where the plant had quit work. But this is not even plausible. And, if they were to persist in remaining in the way, they should have taken extra precautions, to the end that its presence there would be ascertained by the coming boats at the very earliest possible moment, either by having more lights or by whistling. The single light which it had did not conform to the requirement of the board of supervising inspectors of steam vessels, in that it was not as much as eight feet above the surface of the water. That such was the case appears from the evidence introduced on behalf of the dredging plant. That on behalf of the Sallie Marmet and her tow is very strong to the effect that it was not more than 4 or 5 feet from the water. The less the height such a light is from the water, the more difficult is it to determine the distance from it. This was an additional particular of fault on the part of the operators of the dredging plant. But, instead of either getting out of the way or taking such extra precautions, all on board, save a solitary watchman, retired to their slumbers, leaving it to the operators of the coming towboats to deal with the dangerous situation as best they might.

These considerations drive us to the conclusion that the operators of the dredging plant were at fault, and that grossly so. Their fault consisted of three particulars: They anchored the plant at an improper place without any reasonable necessity therefor. The sole light displayed was not placed at the proper height from the surface of the water. They failed to take the extra precautions which the situation demanded, if they were to remain in that improper place. The first of these faults was the main fault. The other two may be said to have grown out of it. This fault, as may also be said of the second, was a statutory fault, in that it was a violation of section 9920 of the act relating to rivers and harbors, which provided that:

> "It shall not be lawful to tie up or anchor vessels or other craft * * * in such manner as to prevent or obstruct the passage of other vessels or craft." 10 U. S. Comp. Stat. 1916, p. 12210; 9 Fed. Stat. Ann. (2d Ed.) p. 60.

That this fault was a violation of this provision is established by the cases cited in the annotation thereof in each of these works. This provision, however, merely emphasizes and is declaratory of the gen-

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eral maritime law. There is nothing in the fact that the work was being done under a contract with the government and the supervision of a government inspector, then on the dredge, to relieve the owner of the dredging plant of responsibility for the fault of the operators thereof. The contract required the contractor to do the work in such manner as to obstruct navigation as little as possible, and provided further:

"In case the contractor's plant so obstructs the navigation as to impede the passage of vessels, it shall promptly be so moved as to afford a practicable passage on the approach of any vessels."

And again:

"The contractor will be responsible that his employés observe the laws of the United States, affecting operations under this contract."

We do not understand that it is contended otherwise on behalf of the owner. It is said in its brief:

"But, while the dredge had a lawful right to obstruct navigation, she must obstruct it as little as possible, so as not to impede the passage of vessels."

It must further be held that this fault on the part of the operators of the dredging plant was the efficient and proximate cause of the collision.

[2] This brings us to the question as to whether there was fault on the part of the operators of the Sallie Marmet and her tow. Were they at fault also? And, if so, was such fault on their part contributory to the collision? If these questions are answered in the affirmative, it is immaterial as to the degree of fault as compared with that of the operators of the dredging plant. It counts for nothing that the degree of fault on the part of the latter was the greater. The damages covered by the collision must be divided. The Alabama v. The Gamecock, 92 U. S. 695, 23 L. Ed. 763; The Max Morris (D. C.) 24 Fed. 860; Great Lakes Towing Co. v. Masaba S. S. Co., 237 Fed. 577, 150 C. C. A. 459. In the Scioto, Fed. Cas. No. 12,508, Judge Ware said:

"The whole damage done to both vessels is put into one mass in common, and each pays one-half, without regard to the different values of the vessels, when both parties have been in fault, without attempting to discriminate whether the faults had not been greater on one side than the other."

[3] But in order to this the evidence of such fault on the part of the operators of the Sallie Marmet and her tow must be as cogent as that of fault on the part of the operators of the dredging plant. In The City of New York, 147 U. S. 72, 13 Sup. Ct. 211, 37 L. Ed. 84, it was said by the Supreme Court, through Justice Brown:

"In view of the recklessness with which the steamer was navigated that evening, it is no more than just that the evidence of contributory negligence on the part of the sailing vessel should be clear and convincing. When the fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption at least adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor."

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This court, in the case of Lake Erie Trans. Co. v. Gilchrist, 142 Fed. 89, 73 C. C. A. 313, through Judge Lurton, said:

"The fault of the Mack being established beyond cavil she is not entitled to divide damages with the Rome upon criticism of her management, except upon clear proof of some fault not made in extremis, and reasonable doubt should be resolved in her favor."

And again, in the case of Western Transit Co. v. Davidson, 212 Fed. 696, 129 C. C. A. 232, through Judge Denison, it said:

"That when the primary liability is placed elsewhere the contributing fault must be very clear."

[4] Here the fault of the operators of the dredging plant is beyond cavil. The case of the owner of the Sallie Marmet and her tow against them is established beyond a reasonable doubt. That of the owner of the dredging plant, as against the operators of the Sallie Marmet, must have been established beyond such a doubt, if there is to be division. It must be so established, both that they were at fault, and that the fault on their part contributed to the collision. This is not a case for the application of the principle that, where there is a collision between a moving and an anchored vessel, the presumption is that those in charge of the moving vessel were at fault. That applies only where those in charge of the anchored vessel were not at fault. Here the presumption is that those in charge of the moving vessel were not at fault; and this presumption is aided by the consideration that, at best, Manchester chute was a dangerous place for towboats with tows to pass through. This fact was calculated to make the operators of the Sallie Marmet and tow alert, and to use all the skill at their command in making the passage.

Nine different particulars are pointed out in which it is claimed that these operators were at fault. They were mainly on the part of the pilot; and the faults on his part may be summed up in two—improper navigation after he discovered the light on the dredging plant, and failure to discover it sooner than he did. In judging the pilot's conduct, it is to be borne in mind that he was "in extremis" from the time that he discovered the light. It will be shown later that such was his condition from the time it is claimed that he might have discovered it. But beyond question such was his condition from the time that he actually discovered it. It is difficult to determine the distance the head of the tow was from the plant when he first made the discovery. But, however this may be, this much is certain: He discovered it as soon as he made the turn to cross over towards the Island—i. e., when the plant was directly ahead of him—and he did not discover it sooner; for such was his testimony, and we are limited to this in determining the matter. He testified as follows:

"When I first started from Light No. 2 backing, to throw my head up, the steamboat was lying out in this direction, and the tow pointed to the Kentucky shore. By the time I got through backing to throw my head up, the steamboat was lying in the bend. That is when I discovered the light; when I threw my head up. That throws the steamboat down in the bend, and the head of my tow was pointing towards Manchester Island, the Ohio shore."

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From that time at least he was in extremis, and, this being so, no mere error of judgment on his part as to what was best to do can be attributed to him as a fault. The main particular in which it is claimed that the pilot was in fault in navigation after such discovery was in not attempting to pass the plant on the right or Island side, and it is urged that he was headed so to do, and changed therefrom to the left or Kentucky side. Such, however, was not the case. He was headed for the plant, and what he did was to choose to attempt to make the passage on the left or Kentucky side, rather than on the right or Island side. The most that it is possible to say is that this was an error of judgment. The Leader and the Florence Marmet chose the same course, and all the rest which passed after the collision went to the same side of the sunken barge. But it seems to us that there was not even any error of judgment in making this choice. It is true that the Leader as she went up on August 28th, the Val P. Collins, and the J. T. Hatfield got around safely on the other side. But both the Leader and the J. T. Hatfield had trouble in so doing, and the tow of the Val P. Collins missed the dredge only 5 feet. To make that side called for two turns, whereas to make the left or Kentucky side called for only one, and as it turned out the depth of water over the rock bar was sufficient to permit a passage without rubbing it.

Before the pilot discovered the light, he had been backing; i. e., operating his engines reversed. As soon as he discovered it, he backed full headway, and continued so to do until the collision took place, in an effort to swing the head of the tow from the plant. It is urged as a further fault in the navigation that the pilot succeeded before the collision in swinging the head of his tow clear of the plant, and that he should then have reversed his engines and gone ahead forward, which would have counteracted the drift of the current towards the plant and prevented the collision. But we do not gather from the evidence that the pilot ever succeeded in swinging the head of his tow clear of this plant, and that it was again drawn to it by the current. He nearly succeeded in swinging it clear. As stated, had the repair flat been out of the way, there would have been no collision. But he did not, before the collision, succeed in swinging it entirely clear. Then, if he had so succeeded, that he did not then drive ahead may be attributed to no more than error of judgment. The fact that the other boats got by safely is no evidence of the fact that the pilot of the Sallie Marmet was at fault. The conditions in each instance of safe passage were different in certain particulars from those existing in case of the Sallie Marmet, and they may have been different in other particulars not appearing. At most, this circumstance can go no farther than show an error of judgment on the part of the pilot of the Sallie Marmet. Each of the others made a narrow escape. Whichever way was chosen, it was prudent to get as close to the plant as could be done with safety; for on the one side the rock bar had to be avoided, and on the other the sand bar.

How, then, was it in the matter of discovering the light? Was the pilot at fault in not discovering it sooner? In determining whether

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he was at fault in not discovering it sooner, a conclusion must be reached as to how soon he could have discovered it. It is contended that he could have done so above the two islands, by looking down between them. It is not unlikely that he could. But that is entirely too problematical to justify charging him with fault. It is problematical, too, if he could have discovered it then, whether he should have done so. It is further contended that he could have discovered it when about opposite Light No. 2, referred to in the quotation heretofore made from his testimony. This is a government light on the Kentucky shore a little above the middle of the Towhead, and it is about 4,200 feet above where the dredging plant was located. It is likely he could. A straight edge placed on the map shows that he could. But it cannot be said that he could beyond reasonable doubt, or, to use Judge Lurton's phrase, "beyond cavil." None of the boats passing down that evening saw it that far away; and it has not been shown by any appropriate test that he could. A test was made on behalf of the dredging company when the river was 30 feet high at Portsmouth. But nothing is to be gathered from what was so disclosed as to how soon the pilot of the Sallie Marmet could have discovered the light on the night in question. It is not unlikely that the timber on the Towhead and the willows growing on its bank, particularly the latter, prevented his discovering it until he was somewhat below the government light. It does not appear when the pilots on the Leader and the J. T. Hatfield first discovered the light. But it does appear when the pilots on the Florence Marmet did, and the point where they first discovered it was somewhat above where the pilot of the Sallie Marmet did and somewhat below the government light; and a test made with the Sallie Marmet on behalf of the coal mining company, when the stage of water was about the same as it was that night, tends to support the position that where the pilots of the Florence Marmet discovered the light was about the place where it could first have been discovered.

It is not easy to determine how far from the dredging plant this point was. Two maps were introduced by the coal mining company —one made from observation and the other from observation and measurement; and the points where the light was first discovered by the pilot of the Florence Marmet and the pilot of the Sallie Marmet were indicated on the former. The pilot of the Sallie Marmet testified that he first discovered it when he was 200 or 250 yards—i. e., 600 or 750 feet—from the dredging plant. This of course meant when the head of his tow was that distance therefrom. The pilot on the Florence Marmet testified that he first discovered it when they were 1,300 or 1,400 feet from it. It would seem that in both instances a mistake was made. The distance was greater than that estimated. The light on the plant was not far above the surface of the water, possibly not more than 4 or 5 feet. As heretofore noted, the less the height it was above the water, the more difficult it was to estimate the distance. According to the indication on the map the head of the Sallie Marmet was as much at least as 1,300 or 1,400 feet from the light, and the Florence Marmet as much as 500 feet, and probably more, further away. It must be taken, therefore, that the pilot of the

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Sallie Marmet did not discover the light as soon as he could have done. He could have at least discovered it as soon as it was discovered on the Florence Marmet. Possibly he could have discovered it when about opposite the government light; i. e., 4,200 feet away.

Was he at fault, then, in not discovering it sooner, or as soon as he could have done so? In judging his conduct, it is to be borne in mind that he did not know that the dredging plant was so located, and he had no reason to suspect that it was. His partner, who was to take his place at midnight, and who came into the pilot house after he discovered the light, was the pilot on the Leader when she went up on August 28th, and he had, at some time theretofore, exactly when not appearing, told him that the Northern No. 2 was at Manchester digging sand, not saying exactly where. He supposed that it was at the wharfboat, down next to which the sand bar on the Island extended. Had he known that the work was being done at the place of collision, it was not to be contemplated that she would be anchored there after night, when it must have been known that the fleet of towboats was coming down. The pilots on the other boats, except those on the Florence Marmet, seemed to have known that the dredging plant was at work somewhere about Manchester; but it never occurred to any of them that she would be so anchored under those conditions. The reason he gives for not discovering the light sooner was that he was watching the head of his tow. When he reached the Government Light he reversed his engine and continued to back slowly, floating with the stream, until he discovered the light, when he put on all his power in backing. He backed, and watched the head of his tow, in order to make the turn successfully. Until he began to turn, his head was towards the Kentucky shore, and the light was to his right, not ahead of him. He stood on the starboard side of his wheel, and he testified that it is probable that he had the stacks between him and the light. Now it cannot be said beyond cavil that he was at fault in so watching and so standing, when he had no reason to suspect that such an obstruction was in his course. His testimony was that in floating, backing slowly, it was his practice to stand on the starboard side, and that most all of the pilots did so. The only obstruction that he had reason to suspect might be in his way was an ascending boat. It does not follow from the fact that his attention to the head of his tow and the possible obstruction of his stacks prevented his seeing the light—a single light not far above the water, and that on a bright moonlight night—that they would have prevented his seeing another boat ascending the river. Besides the light was in a line between him and the lights of Manchester, and it is not impossible that this prevented his taking notice of the light on the plant sooner than he did. It was proven by the dredging company that, in explaining the collision shortly thereafter, he said that when he first saw the light on the dredgeboat they were right in the line of the light on the wharfboat at Manchester, and it was some little bit before he could make out what it was.

It must be held, therefore, that there should not be any division of damages because of fault on the part of the pilot of the Sallie Marmet. The only other particular in which it is claimed that its

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operators were at fault was in the matter of a lookout; and this contention must be held to have been made good. Possibly the fault here should be stated to have been, not in not having a lookout, but in that he was not properly performing his duties as such, at and from the time the presence of the dredging plant could have been discovered by him. There was a lookout. He is called a watchman. His place was on the head of the tow, and his duty was to act as lookout. He was not there at and from such time. He had left his post to call the crew for a change of watches, and had not returned. He was in the act of returning at the moment of the collision. He left a deck hand on the head of the tow, but he was engaged in measuring the water in the barges. The only question here, therefore, can be whether the evidence establishes, with sufficient cogency, that such fault was contributory to the collision. If it does not, notwithstanding such fault, there can be no division.

[5] In The Ariadne, 13 Wall. 475, 478, 20 L. Ed. 542, The Genessee Chief, 12 How. 443, 463, 13 L. Ed. 1058, The Roby (C. C. A. 6), 111 Fed. 601, 612, 49 C. C. A. 481, and Great Lakes Co. v. Pittsburgh Co. (C. C. A. 6), 222 Fed. 862, 866, 138 C. C. A. 288, it seems to have been thought that the absence of a lookout raised a presumption, or justified the inference, that the ensuing collision was caused or contributed to thereby. Whether or not such presumption should be considered as generally arising, it is, at the best, a disputable presumption. The Georg Dumois (C. C. A. 4) 153 Fed. 833, and cases cited on page 835, 83 C. C. A. 15. Since, as we have seen, The City of New York, as applied to the facts here, clearly puts the burden upon the dredge to show that the fault of the steamboat did contribute to the collision, the abstract question seems to present itself whether such presumption of causation arising from the absence of a lookout is sufficient to satisfy this burden of proof, or whether a boat, situated as the dredge was here, must go further, and show the facts and circumstances making the inference so strong as to require adoption. We do not think it necessary to decide this abstract question. If such presumption exists, and is strong enough for this purpose, it is because it is the natural chain of inference that a vigilant lookout will discover the danger, that he will promptly notify the pilot, and that the pilot will promptly steer the boat out of danger. This chain of inference and resulting presumption can be applicable only to the ordinary case where the pilot has freedom of action and where the prompt warning will normally bring entire safety. It cannot reasonably apply, and it should not be applied, to a case where at the earliest moment when the warning could have been given to the pilot the boat is already measurably out of control and in extremis, and where it is merely speculative whether the pilot could have done anything that would have avoided the collision, nor to a case where it is uncertain whether a duly vigilant lookout would have made the discovery substantially earlier than the pilot did make it. The facts of this case bring it clearly within the first, and perhaps within the second, of the classes just stated, as will now be pointed out.

It is quite likely that, if the lookout had been at his post and properly attending to his duties, he would have made such earlier discovery

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of the light. But there are considerations which might have affected his discovery. It was not ahead of him, but off to his right. It was a single white light. There was a bright moonlight. It was on the far side of the dredge and near the water; and possibly the lights of Manchester would have confused him to some extent. Then, possibly, reasonably he would not have felt called on to communicate his discovery to the pilot on the ground that the latter had already discovered it. The basis for such a thought is to be found in the circumstance that from the time he could have discovered the light the engines of the towboat were reversed, and she with her tow was under control, floating down the river. And, finally, it is difficult to say with any degree of confidence that if the lookout had been at his post, and had discovered the light and communicated his discovery to the pilot as soon as he could have done so, or at least sooner than the pilot himself discovered it, the latter by the exercise of reasonable care could and would have avoided the collision. Beyond question, if the pilot had become aware of the presence of the dredging plant sooner than he did, he would have had a better opportunity of avoiding the collision than he had when he discovered it himself. As heretofore stated, he did not discover it until he had centered on the dredging plant. To avoid the collision he had to get his tow off the plant as well as to determine which side to take. Had he discovered it sooner, his sole problem would have been to so determine. But it does not follow, necessarily, that because he would have had a better opportunity to avoid a collision, had he become aware of the presence of the light sooner than he did, that by the exercise of reasonable care he could and would have avoided it, if its presence had been communicated to him by a proper lookout properly performing his duties, as soon as he discovered it.

In determining this, note must be taken of the fact that from the time when such a communication could have been made to him he was in extremis. It was not possible for him to stop. He did not have sufficient power to back upstream, or even to hold his tow against the current. There was nothing on the Kentucky shore to tie to. He was compelled to go ahead and confront the extremely dangerous situation ahead of him. The situation was extremely dangerous. It was not certain that he could get by safely on either side. Whichever side he took he was in danger of being drawn by the swift current against the dredging plant. It was important for him to go as close to it as he could possibly do with safety. On the left he had to avoid the rock bar, and on the right the sand bar. Possibly there was less danger in striking the sand bar than the rock bar. But in going that way he had two turns to make. The situation was so dangerous that there is reason to believe that neither the Sallie Marmet, nor the Florence Marmet, nor the J. T. Hatfield would have attempted to make the passage, had they known it before they were where they could not keep from going ahead and confronting the danger. It was calculated to alarm and scare the pilots of each of these towboats, and did alarm and scare each of them. Any error of judgment on the part of the pilot of the Sallie Marmet, in the contingency under con-

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sideration, would have been a mere error of the moment, and not a fault.

Can it, then, be confidently said that if there had been a proper lookout, and he had communicated the presence of the light to the pilot as soon as in the proper performance of his duties he discovered it, the pilot by the exercise of reasonable care could and would have avoided the collision? It does not follow that such would have been the case, because the Florence Marmet, which took the left, and the J. T. Hatfield, which took the right, made the passage in safety, the latter with much difficulty. Possibly—not improbably—to avoid the rock bar he may have determined that he should go closer to the dredging plant than did the Florence Marmet, and possibly—not improbably—the Sallie Marmet may not have been as good a twister as the J. T. Hatfield. Whichever way he went, therefore, he may have been drawn onto the dredging plant by the swift current. We think, therefore, that it cannot be said "beyond cavil" that the collision would not have happened by the exercise of reasonable care on the part of the pilot of the Sallie Marmet in the contingency stated; and if for this reason it cannot be said that the absence of a proper lookout was not contributory to the collision, for the same reason, if we should be in error in the position that the pilot was not in fault in himself not discovering the light sooner than he did, it cannot be said that his fault was contributory thereto.

The case, then, comes to this: It is an absolute certainty that the operators of the dredging plant were flagrantly in fault, and that such fault on their part was an efficient and a proximate cause of the collision; whereas, on the other hand, though the operators of the towboat and her tow were in fault in the matter of the lookout, but not flagrantly so, at best it is no more than a matter of speculation, to a more or less extent, that such fault contributed thereto. Such being the case, there should be no division of the damages.

We are therefore constrained to hold that the decree of the lower court should be affirmed on the appeals of the dredging company, and reversed on that of the coal and mining company, with directions to enter a decree in its favor, for the sum of $2,775.93, the damages found to have been sustained by it, with interest thereon from 2d day of March, 1917, and costs.

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(259 Fed. 450)

CITY OF TOLEDO v. TOLEDO RYS. & LIGHT CO. et al.

(Circuit Court of Appeals, Sixth Circuit. June 4, 1919.)

No. 3262.

1. STREET RAILROADS ⟹66—EXPIRATION OF FRANCHISE—RIGHTS OF PARTIES.
On expiration of the franchise rights of a street railroad company to use the streets of a city if the company at the city's request continues to occupy the streets and to give service, the regulatory power of the city can be exercised only subject to the condition that it must not bring about confiscation.

2. CARRIERS ⟹18(6)—INTERFERENCE WITH OPERATION BY CITY—REGULATION OF RATES—INJUNCTION.
An order granting a preliminary injunction restraining a city from interference with the control, operation, or management of a street railway system by the company or with its collection of fares in accordance with a schedule adopted, but expressly recognizing the right of the city to act through appropriate legislation, *held* justified by threatened executive interference.

3. COURTS ⟹316—JURISDICTION OF FEDERAL COURTS—COLLUSIVE SUIT.
The fact alone that a complainant through ownership of stock of another corporation had a controlling stock interest in defendant corporation *held* not to deprive a federal court of jurisdiction, where there was the requisite diversity of citizenship.

4. COURTS ⟹30—DORMANT SUIT—LOSS OF JURISDICTION.
While a court will not permit a case to lie dormant indefinitely, with the consent of everybody, and then allow it to be used by one party against the objection of the other, as a basis for exercising power that would not otherwise exist, mere unexplained inaction for a year and a half does not ipso facto destroy the power of the court to proceed when both parties consent.

5. COURTS ⟹278—DORMANT SUIT—LOSS OF JURISDICTION.
Where, after the decision of federal court to appoint a receiver for a street railroad company, a plan was agreed to by the parties for the operation of the property under direction of the court which was in effect a substitute for the receivership, which plan was carried out for a number of years, the court did not during such time lose jurisdiction of the case.

6. COURTS ⟹282(1) — JURISDICTION OF FEDERAL COURTS — CONSTITUTIONAL QUESTIONS.
A federal court has jurisdiction of a bill, whether original or ancillary, which raises an issue involving constitutional rights.

7. CARRIERS ⟹18(6)—RATES OF FARE—POWER OF COURTS—INJUNCTION.
While a court is without power to affirmatively fix rates of fare to be charged by a street railroad company, it may determine that the enforcement of a rate lower than one proposed would be confiscatory and enjoin the same, and may refuse an injunction, unless the company will accept that rate which the court finds to be reasonable.

8. CARRIERS ⟹18(6)—RATES OF FARE—INJUNCTION.
The rule sometimes followed of permitting enforcement of a reduced rate of charge by a public service corporation, as a street railroad company, for a trial period, does not require a trial period for a partial increase, where the unchallenged computations show a larger increase to be necessary.

Appeal from the District Court of the United States for the Western Division of the Northern District of Ohio; John M. Killits, Judge.

Suit by Doherty & Co. against the Toledo Railways & Light Company and the City of Toledo. The City appeals from an order grant-

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ing a preliminary injunction on a cross-bill by the Railways Company. Affirmed.

The city of Toledo appeals from an order for temporary injunction which restrained it from certain interference with the street railway system operating in that city. The city's complaints are reducible to three: First, that there was no reasonable cause to anticipate unlawful conduct by the city; second, that the injunction prevents proper legislative action by the city; and, third, that the court below was without jurisdiction. The appeal involves more or less directly the long and complicated history of the relations between the city and the street railway system, and of the litigation which is now before us. For present purposes, a brief recapitulation will be sufficient; many of the details will be found more fully stated in the opinions of the District Court, reported in United States v. Toledo Newspaper Co., 220 Fed. 458, and Doherty & Co. v. Toledo Railways & Light Co., 254 Fed. 597.

Early in 1914, the most important street railway franchises were about to expire. The city was endeavoring to secure future operation under an ordinance granting the use of the streets, but prescribing a three-cent fare. Doherty & Co., a partnership, who were citizens of New York, filed, in the court below, a creditors' bill in the usual form. It alleged the recovery of a judgment against the street railway company and an execution returned unsatisfied and the existence of equitable assets and prayed the appointment of a receiver, and a motion therefor was entered. Shortly thereafter, by an amended and supplemental bill, it brought in the city of Toledo as an additional defendant, alleged that the course of action being pursued by the city was resulting in the unlawful destruction of the assets of the company, upon which plaintiffs had an equitable lien and which they were seeking to have the court take into its possession, and prayed that the city be enjoined. The court at first refused an injunction, as it seemed that the city was proposing to act by legislation and by judicial proceedings; but later, when it appeared that the city was proceeding by force to impair unlawfully the property interests involved, a preliminary injunction issued. This was in September, 1914. No appeal was ever taken, and the injunction has ever since continued in force; it was fully respected; and that phase of the controversy has continued to be quiescent.

In connection with this injunction proceeding, the railway company had filed its answer to the Doherty bill, also claiming, on its own account, relief against the city similar to that asked by the bill, and the city had filed its answer both to the amended bill and the city's dependent cross-bill, so that the issues were fully joined. No proofs were taken by any party, excepting upon the motion for preliminary injunction. While the case stood thus, and in April, 1916, a dispute arose between the company and its employés as to wages and service conditions. It resulted in a strike and a cessation of service; whereupon, the city filed, in this same Doherty Case, its "amended and supplemental answer and cross-bill," alleging that an uninterrupted continuation of the street railway service was essential to the public interest, and praying that a receiver of the street railway system be appointed by the court below, who should operate the system under the orders of the court and restore the public service to which the system was devoted. This motion for receiver came on to be heard, and there was more or less informal discussion and presentation of facts. The company professed to be willing to make wage increases, if it could have increased earnings available therefor. The court determined to appoint a receiver, announced that determination, and prepared an order fixing the conditions under which the receiver should operate. For such appointment there was substituted a plan devised by the court, and acquiesced in by the city and the company, that the company should make certain increases in wages, with which the employés were, at the time, content, and should charge increased fares. By the computation then approved by all, it seemed that the increase in fares would produce an excess additional income beyond that required to meet the increase in wages, and it was likewise arranged that such excess should be paid every month to a custodian appointed by the court, and should be expended from time to time by him, under the direction of the court, in the

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purchase of new equipment. Pursuant to this plan, an order was entered appointing such custodian and directing such payments; and from time to time, from then until now, the fund has accumulated and the court has directed and approved disbursements out of it. The application for a receiver was not directly passed upon, and, in form at least, it has ever since continued as a pending motion.

In the spring of 1918, a wages controversy again arose. The employés demanded a large increase. The company professed to be willing to grant satisfactory increases if it could have additional revenues, but insisted that it would be utterly unable to do so from its existing income. Negotiations with the city, as to an increase of fares, resulted in no agreement. Thereupon, the company announced that, on May 10th, it would put into operation a new and advanced schedule, epitomized as "5 cents straight, 1 cent for transfers," and would make a corresponding advance in wages. Further negotiations and discussions resulted in statements which the company interpreted as threats by the responsible city officers that this advanced schedule would not be permitted, but that continued operation at lesser and allegedly confiscatory rates would be compelled by the city by whatever forceful means it might choose to adopt.

Thereupon, the company filed, in this pending Doherty Case, a pleading which it entitled, "Second Amendment and Second Supplement of the Toledo Railways & Light Company to its Amended Cross-bill." Therein it alleged, generally, all the facts which we have recited, and claimed that even its proposed advanced rates would bring it less than a reasonable return upon the value of its property devoted to street railway uses, and hence that any impairment of those rates would be confiscatory. It asked that the city be enjoined from preventing, by threats or force or any unlawful action, the inauguration and use of the new schedule. The motion for such an injunction was heard upon this pleading and affidavits in support thereof, upon the answer of the city, upon proofs taken in open court and recitals and statements made by the court and counsel, and accepted by all in the place of proofs. As a result of the hearing, a temporary injunction was granted. The order recited that the proofs established justifiable apprehension on the part of the street railway company that the city would attempt control and domination of the street railway company in its transportation service otherwise than by legislation within the power of the city to enact, and would produce irreparable damage by causing controversies with citizens respecting the company's right to collect reasonable rates; that a strong probability existed of the necessity of an injunction to protect the company in the exercise of its right to collect reasonable fares, which injunction should continue in force until modified by the court or until the same should be rendered unnecessary by legislation by the city fixing terms and conditions which would bring to the company the return upon its investment required by law. The order thereupon proceeded, restraining the city of Toledo, and all others acting for or with it, "from preventing or attempting to prevent or in any manner interfering with or obstructing the collection by the Toledo Railways & Light Company from and after the date hereof, of fares for transportation upon its street car system at the rate of [the new schedule] * * * from enforcing or attempting to enforce the operation of street cars * * * at any lower rates of fare than that hereinafter set forth * * * from proceeding in any manner to interfere with or take from defendant * * * the control and operation or managment of the street railway system * * * while said defendant * * * is itself actually engaged in the operation of its said street railway system. Provided, that nothing in this order shall be construed as designed to prevent or restrain in any manner the appropriate action of the legislative authority of the defendant, the city of Toledo, to determine the conditions upon which the defendant, the Toledo Railways & Light Company, may continue to use the streets of the defendant, the city of Toledo, in the operation of its street railways for the benefit of the public of such city of Toledo, nor to restrain or prevent said defendant, the city of Toledo, from enforcing such proper and lawful conditions for the aforesaid use of the streets of said city of Toledo, as such city of Toledo might hereafter ordain and establish. Provided, further, that nothing herein contained shall be construed to waive the

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jurisdiction of this court to examine and determine at the instance of defendant, the Toledo Railways & Light Company, its successors and assigns, or any other person or corporation, in this cause or in any appropriate proceeding hereafter begun, the lawfulness or reasonableness of any action taken or to be taken by the city of Toledo in attempting to determine or enforce the conditions for the aforesaid use of the streets of the city of Toledo by the defendant, the Toledo Railways & Light Company."

Ralph Emery, Director of Law, and Cornell Schreiber, both of Toledo, Ohio, for appellant.

George D. Welles, of Toledo, Ohio, for appellees.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge (after stating the facts as above). [1] 1. Upon this record, and in this court, the city does not undertake to dispute the claim of the company that any rates of fare, less than the proposed new schedule, would have been confiscatory, and, if enforced against the company, would have been a taking of its property without justification and would violate its constitutional rights. One of the assignments of error challenges this claim, but it is not argued. Moreover, the city took no proof on this issue and contented itself in the court below with criticisms upon the sufficiency of the company's proofs—criticisms which we think not sound (and see note 6, infra). By the line of decisions of the Supreme Court, culminating in the Denver Water Co. Case, 246 U. S. 178, 38 Sup. Ct. 278, 62 L. Ed. 649, and the Detroit Railway Co. Case, 248 U. S. 429, 39 Sup. Ct. 151, 63 L. Ed. 341, it is now clearly settled that, when the franchise rights of a public service corporation to use the streets of a city expire, the city has the absolute right to order the discontinuance of the service and the removal of the property from the streets; that the company has a corresponding right to make such discontinuance and removal;[1] but that if neither party exercises this right, and if the company, at the city's request, continues to occupy the streets and to give service, the public regulatory power can be exercised only subject to the condition that it must not bring about confiscation. Every controversy of this kind must now be viewed in the light of these settled principles; and, if the city's insistence that the property shall remain devoted to public use were not sufficiently to be inferred from the general situation, it would be expressly found in the city's 1916 application in this cause. In the general principles involved, this case is not distinguishable from the Denver and Detroit Cases.

[2] 2. Of course, an injunction should not be issued except where there is reasonable ground to apprehend that the defendant will act unlawfully unless enjoined. Whether there is such reasonable apprehension presents, in every case, a question of fact. Where the trial court has seen and heard the witnesses, we are always reluctant to set aside its finding of fact; and especially must that be true where the

[1] Doubtless reasonable regulations as to manner of removal may be imposed or demanded, and, though it is not clear how the company's right can be any less absolute than the city's (Cleveland Case, 204 U. S. 116, 27 Sup. Ct. 202, 51 L. Ed. 399), it is not here necessary to consider whether there may be cases where an arbitrary and unreasonable discontinuance of service would not be permitted.

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rightfulness of the conclusion depends largely upon that general knowledge possessed by all citizens of the community, including the judge, and which cannot be reproduced in the printed record. What action the city, through its official representatives, was likely to take, could be determined by the trial judge much better than by us, and, upon a review of the proofs and the arguments here, we see no occasion to disturb his conclusion. We reach this result with the more confidence because the case is one of those where, if the defendant did not intend any unlawful act an injunction would do it no harm, save as a matter of costs and save as to its abstract right to immunity from unnecessary writs. Neither of these exceptions is vital—although each is important, and the second may be sometimes controlling.

We cannot yield to the suggestion that if the mayor had any intent to interfere with, or obstruct the adoption of, the new schedule, he was going to do so as an individual, and not as mayor. The charter of Toledo is such that the mayor dominates the entire executive machinery. He directs the conduct of the police force as fully as he cares to do so, and whatever appprehension rightly existed had reference to the active or passive conduct of the police force or to some actual taking over or control of the entire system by, or at the instance of, the city or the mayor, as mayor.

3. The court below did nothing which interferes in the slightest with the legislative power of the city.[2] It has the right at any moment to require the company to vacate the streets, remove its rails, and to prescribe reasonable regulations and conditions for such removal. It has the right to give this direction either simply or compounded with an alternative. It may say: "Here are our terms; accept and comply with them or get off." It cannot say: "Because you remain and furnish service by our wish and to meet our needs, you are subject to any arbitrary conditions which we may impose." The order contains nothing inconsistent with this right of the city. The city does not claim that it wishes the streets vacated, nor that any action by it was intended to present to the company the alternative of accepting or getting off. In the Denver and Detroit Cases, the substantial difference between the majority and the minority of the court seems to have been as to whether the city had in fact offered such a choice to the company; here, there can be no difference of opinion on that point.[3]

[2] All seem to assume that ample legislative power has been delegated by the state to the city, and we accept that assumption.

[3] The court below said: "The right of the city to eject the company cannot be questioned in any court. * * * If the city attempts to fix the rate of fare, it can only enforce such rates upon it by coupling therewith the alternative order that otherwise the company cease to do business. * * * It is the business of the city to pursue one of two alternatives: To say to this company, 'Quit running your cars and get off,' or say to this company, 'You will not be interfered with if you charge a rate of fare sufficient to pay * * * [net], six per cent.' * * * This court decided * * * that the company could reject unreasonable terms and at the same time continue its service with the expectation of getting proper compensation * * * until the city affirmatively directed the company to leave the streets as an alternative to the acceptance of the unreasonable terms. * * * [The order will] leave the

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Nor does the order impair in the least the city's right to pass an ordinance fixing rates. Repeated statements by the court, if not the express proviso to this effect in the order, should make this clear; indeed, nothing is pointed out to support the stated apprehension that the city council might be in contempt if it attempted to fix rates, save the fact that the proviso permits only "appropriate" action by the council. This word does not nullify that proviso. The council never had any right to pass a confiscatory ordinance, and we see in the word "appropriate" no implication of any limitation except that which exists by law. It is clear to us that, without embarrassment from this order, the city council may proceed at any time, and from time to time, to fix what it regards as reasonable rates of fare, and that these must be observed by the company unless it shall be decided by competent judicial authority, provisionally or finally and according to established practice, that they will operate with confiscatory effect.[4]

[3] 4. The record suggests two bases for the jurisdiction of the court below. They are: First, that the proceedings are ancillary to, and dependent upon, the original Doherty judgment creditors' bill, and therefore supported by the diverse citizenship which there appeared; and, second, that the pleading filed by the company, and which was the immediate basis of the present proceeding, independently gives jurisdiction because it presents a question arising under the Constitution of the United States.

The judgment creditors' bill filed against the company, and, by amendment, against the city and the company, clearly presented a sufficent case of diverse citizenship. All the plaintiffs were citizens of New York and both defendants were citizens of Ohio. The only impeaching suggestion is that the bill was collusively filed. It appeared that Doherty & Co. owned the controlling interest in, and actually dominated, a corporation known as the Cities' Service Company, and that the Cities' Service Company owned and controlled the defendant company; but the utmost that can be inferred from this relationship is that the defendant company would do whatever Doherty & Co. desired, and would do nothing else; and, to state this result in the strongest terms and apply it to this situation, is to say that the bill was filed in the court below with the consent of the defendant company, or even to say that Doherty & Co. and the defendant company agreed that it should be so filed, as the best move for the interests of both. If this constituted that collusion which is fatal to jurisdiction on the ground of citizenship, the court should not have entertained this bill nor any ancillary proceeding solely dependent thereon; but while it does indicate "collusion," in the vague sense in which that word is sometimes used, we think the law is clear that, unless there is something more, a District Court of the United States should entertain a case so presented.

It is settled for this court (and we do not mean to intimate any

company free to apply to the court for relief against unreasonable legislation, unless the city authorities are brave enough to couple with unreasonable provisions of its legislation a specific alternative that the company must accept them or quit the streets."

[4] In this opinion we use "confiscatory" and "giving less than a reasonable return" as entirely equivalent terms.

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doubt elsewhere), by our decision in City of Holland v. Holland Gas Co., Feb. 13, 1919, 257 Fed. 679,168 C. C. A. 629, that there is, in such a case, no such merger of identity between the controlling stockholder and the controlled corporation as prevents the former from pursuing, in good faith as a stranger could, any ordinary legal remedy against the latter; and so the question of collusion here becomes —save as to degree of proof and as to mere color—the same as if between strangers carrying out their common understanding. It is necessarily to be deduced from, if not expressly ruled in, Blair v. Chicago, 201 U. S. 400, 448, 26 Sup. Ct. 427, 50 L. Ed. 801; Chicago v. Mills, 204 U. S. 321, 330, 27 Sup. Ct. 286, 51 L. Ed. 504; Re Metropolitan Receivership, 208 U. S. 90, 110, 28 Sup. Ct. 219, 52 L. Ed. 403, and see opinion of Judge Lacombe (Pennsylvania Steel Co. et al. v. New York City Ry. Co. [C. C.] 157 Fed. 440, 444); and Wheeler v. Denver, 229 U. S. 342, 350, 33 Sup. Ct. 842, 57 L. Ed. 1219—that a nonresident plaintiff has an absolute right to pursue, in a federal court, all his remedies against a resident defendant, and it makes no difference what his motive may be in electing the federel remedy. He may do so expressly because he wishes to keep the litigation out of the state courts; that is his constitutional right. See, also, Cowles v. Mercer Co., 74 U. S. (7 Wall.) 118, 122, 19 L. Ed. 86. So, it is wholly immaterial whether the defendant, in acquiescing in the plans for a federal forum, is inspired by the same motives. If the consent of the defendant were important to the jurisdiction, that would be another question; but, where the plaintiff's right to choose that forum is absolute and defendant's opposition cannot impair it, no more can defendant's consent do any harm.

Cases where plaintiff's right to sue depends on the Ninety-Fourth Equity Rule (New Rules, 27) are of the consent class just mentioned. Certain good-faith action by the corporation is an essential preliminary, and it might be impossible to say that a company controlled by plaintiff had, in good faith, refused plaintiff's request; but that is not this case. See Iron Moulders v. Niles Co. (C. C. A. 6, opinion filed Nov. 6, 1918) 258 Fed. 408, 169 C. C. A. 424. The suit is not upon a claim assigned by a resident assignor, who continues the real party in interest, as in Miller & Lux v. East Side Canal & Irrigation Co., 211 U. S. 293, 29 Sup. Ct. 111, 53 L. Ed. 189; nor is it a colorable rearrangement of parties, as in Dawson v. Columbus Co., 197 U. S. 178, 25 Sup. Ct. 420, 49 L. Ed. 713.

[4] We conclude, therefore, that the jurisdiction to entertain the bill as first amended and to appoint a receiver for all the property of the defendant company, and, if necessary, to operate the property temporarily through a receivership, was clear and certain; but, as we follow its history, we see that the conduct of the parties tended towards an abandonment of the case. No actual effort was made by plaintiff to get a receiver, and no step was taken towards a final decree. The court would not permit a case of this kind to lie dormant with the consent of everybody, indefinitely, and then allow it to be used by one party, against the objection of the other, as a basis for exercising power that would not otherwise exist. No precise limits of time can be fixed by general statement, but it is clear that the party making such

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objection would, in any case where there had been long delay, have strong reason for asking the court to say that the appeal to its limited jurisdiction had served its purpose and was abandoned; but certainly mere unexplained inaction for a year and a half does not, ipso facto, destroy the power of the court to proceed when both parties consent. That is what happened here, for in April, 1916, the city proceeded, in this case, upon the theory that the court had taken jurisdiction between the parties and constructive possession of the res—the property of the street railway company.[5] The city asked the exercise of that jurisdiction by the appointment of a receiver to protect its interests. Of course, jurisdiction cannot be conferred upon a District Court by consent, but that principle is not involved. The city was waiving, instead of insisting upon, its possible right to claim that the once vested jurisdiction should be no longer exercised.

[5] If a receiver had been appointed by the court below, in 1916, and had still been in control and management of the property, it would be clear that the present proceeding was ancillary and dependent; and we do not see that the situation is materially different. Any delay by the city in prosecuting its motion for a receiver to final decision, which delay is short of abandonment, only affects discretionary powers. It does not take away all power. The record shows that the court concluded to appoint a receiver, and was about to make the order when the parties agreed upon an arrangement which was to be, in an essential part, carried out, and ever since has been carried out under the orders of the court from time to time, which arrangement was a substitute for a receiver, and made the actual appointment of a receiver unnecessary for the time being. In a fair and substantial sense, there was a pro tanto receivership, and the application for a general receivership had been argued and submitted to the court and remained undecided; and that such a situation gives to the court constructive possession of the property is established. Farmers' Co. v. Lake Co., 177 U. S. 51, 61, 20 Sup. Ct. 564, 44 L. Ed. 667; and see Prout v. Starr, 188 U. S. 537, 544, 23 Sup. Ct. 398, 47 L. Ed. 584; Ex parte Young, 209 U. S. 123, 161, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764; Rickey Co. v. Miller, 218 U. S. 258, 262, 31 Sup. Ct. 11, 54 L. Ed. 1032. It follows that since this immediate proceeding was brought for the protection of that property from injury and for instructions to the parties as to what they should do, just as it would have been for instructions to the receiver, if the substituted arrangement had not been in force, the jurisdiction of the court below to take the action which it did take must be sustained upon the first ground suggested.

Another view confirms this result. The city asks a receiver. While its petition is pending, and the company has so far escaped the full and general appointment, the city proposes to do acts which will compel the receivership, and then says the court has no power to enjoin such acts. Only in the clearest case could such an objection prevail.

[6] The second ground of jurisdiction is at least equally clear.

[5] The city, by its supplemental answer and cross-bill, reserved its protest against the jurisdiction; but this protest referred to its formerly overruled claim of collusion, and not at all to the intervening delay.

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Whatever force there may be in the facts stated in this new and supplemental pleading as supporting the jurisdiction of the court below cannot be lost merely because the pleading does not purport to be the commencement of a suit. This new pleading expressly made the city a defendant thereto, and stated facts said to entitle the company to relief, and prayed relief. If the issue so made was justiciable in the court below, it cannot be important whether the pleader considered his petition to be original or dependent.

It seems clear that the facts alleged in this pleading disclosed a proposed taking of the company's property without due process of law. That an attempt to compel a public service company in this situation to give or continue service at a rate which does not permit a reasonable return, is in violation of the company's constitutional right, is not open to question, since the decision in the Denver and Detroit Cases. Even when it turns out that the city is acting lawfully, jurisdiction is given over the whole case, if there is a substantial and good-faith claim of deprivation of constitutional rights. Columbus Co. v. Columbus (S. C. U. S., April 14, 1919) 249 U. S. 399, 39 Sup. Ct. 349, 63 L. Ed. 669. It is true that in the Denver, as also in the Detroit, Case, the city was proceeding to enforce an ordinance; but the ordinance had not been accepted, and was important only as evidencing the city's requirement that the service should be continued. Here, we have the same requirement evidenced both by the city's petition in the cause, and by the mayor's constant insistence that, "whatever happens, the cars will run." In both cases, it was the executive action, not the legislative, that was enjoined. The constitutional prohibitions are not alone against any "law" of the forbidden scope; the Fourteenth Amendment reaches any action, by the representatives of a branch of the state, which unlawfully "deprives" the plaintiff of property rights.

[7] It is also urged that the making of rates for public service is not a judicial function, and that the court has no power to make rates. It is true enough that the direct power of the courts on this subject is negative and not affirmative. Reagan v. Farmers' Co., 154 U. S. 362, 400, 14 Sup. Ct. 1047, 38 L. Ed. 1014. To say that a specified rate is invalid because confiscatory is always to say that any lower rate will also be invalid, and sometimes the facts will be such that, in order to decide whether the rate in question is unlawful, the court must first determine with some accuracy what would be the minimum reasonable return. It is likewise plain that, when an injunction is asked to restrain the enforcement of an unreasonable rate, the court may make its granting conditional upon the doing of equity by plaintiff, and thus may require the plaintiff to consent to charge no more than what seems to the court to be reasonable—just as, in tax injunction cases, the plaintiff is often required to pay what the court thinks a fair tax before it will give relief against the excessive part. In any of these instances, there is an indirect fixing or determination by the court, but each of these indirect results is fully within the judicial power. In the present case, the findings and the injunction do not affirmatively fix a rate. They are directed only against any rate smaller than the sum named, and stand upon the underlying fact that even this sum will not bring a minimum reasonable return.

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[8] It is further urged—though perhaps rather as an objection against right than as against power—that the court should have made no order until after there had been a trial period at the rate which the city was willing to approve, according to the precedent set by Willcox v. Consolidated Co., 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382, 48 L. R. A. (N. S.) 1134, 15 Ann. Cas. 1034, and Knoxville v. Water Co., 212 U. S. 1, 29 Sup. Ct. 148, 53 L. Ed. 371. Those precedents are not applicable. Where a proposed reduction in the current rate is involved, there is an increase of custom to be anticipated, which, with some other elements of uncertainty, tends to neutralize the diminution of income otherwise resulting from the reduction. In this case, the trial period had occurred. The existing rate had been in force two years and had proved to be insufficient. It was proposed to increase the rate to meet new and increased expenses, and it was certain that the increased rate would tend to diminish the custom; but the computations were made on the basis of the number riding during the four months' period then ending, and without scaling down (except on transfers) on account of the inevitable loss of travel which would ensue when the price was put up. Hence, we see no reason why it was incumbent on the court below to require a trial period of operation under the partial advance which the city was willing to concede, before permitting the full advance which appeared to be necessary.[6] It may be added that a year of operation under the high rate

[6] After finding that the value of the property upon which a return should be computed was probably much more than $8,000,000, and that financial conditions in Toledo were the same as those found in the Denver Case, and hence that the net return should be at least $480,000, the court below continued:

"It seems certain that the very best that can be said for the city, under any circumstances, is to say this, and it is the clear indication of the evidence before us that a fare of five cents, with a one cent charge for transfer, will, under present circumstances, not pay the company's operating expenses enhanced by an increase of wages, and even this surplus. Indeed, the city, if we may judge from the character of its argument to the court, is not seriously combating this proposition. It does not argue anywhere in its brief that this rate is exorbitant. All the city now contends for is to try some lower rate of fare by way of experiment and see what the result will be, although all the evidence before this court indicates most clearly that the mayor's proposition of eleven tickets for fifty cents, with free transfers, will not meet what is due the company.

"We are unable to see any right in the mayor to ask the company to submit to an experiment which present conditions show will be a losing one. From his testimony and the arguments submitted in behalf of the city, it does not appear that he had any confidence that this rate was adequate, for he says that, in fixing upon it, he was moved by the theory that the car rider, the carmen, and the car company each must sacrifice something in the present emergency. But the mayor of Toledo has no right to demand of this franchiseless company that it render service to the city at a sacrifice, nor has he the right to say to the employés of the company that they must work for less wages than their services are fairly worth. He ignores the fact that it is no sacrifice for the car riders of the city to pay any rate of fare which is what the service to them actually costs, and the economic truths that they should pay what the service to them costs, that the car men are entitled to a reasonable wage, and that the car company is entitled to a compensation which will allow it to live. No one has the right, whether an official or not, to ask either the carmen or the car company to make 'sacrifices' that the car riders may get service for less than cost, and, of course, the court can listen to no such proposition as that to support an insistence that an inadequate rate should be imposed."

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has now passed, and there has been no claim made that it was turning out to be more than necessary.

From these views, it follows that the order appealed from should be affirmed.

(259 Fed. 460)

LE FANTI v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. June 14, 1919.)

No. 2477.

1. CRIMINAL LAW ⟹1178—APPEAL AND ERROR—QUESTIONS CONSIDERED.
   A proposition in a criminal case, merely mentioned during the argument, but not raised in brief, nor at trial, nor contained in the assignments of error, will not be considered.
2. RECEIVING STOLEN GOODS ⟹4—CONSTRUCTIVE POSSESSION.
   The doctrine that one intending to receive stolen goods, but withdrawing before committing the crime, cannot be convicted, is inapplicable, where accused had constructive possession of the property.
3. RECEIVING STOLEN GOODS ⟹8(3)—CONSTRUCTIVE POSSESSION—SUFFICIENCY OF EVIDENCE.
   Evidence that accused told boys who had stolen a bale of silk that his place was being watched, that he showed them where to hide the silk, etc., *held* to sustain jury finding that the silk passed to accused's constructive possession.
4. RECEIVING STOLEN GOODS ⟹1—ELEMENTS—THEFT.
   In a prosecution for receiving stolen goods, under Act Feb. 13, 1913 (Comp. St. §§ 8603, 8604), the purchase of property not actually stolen is not criminal, even if the accused buyer believed it to have been stolen.
5. RECEIVING STOLEN GOODS ⟹8(3)—SUFFICIENCY OF EVIDENCE.
   Evidence that accused, when offered a stolen bale of silk by express employés, told them to drive to a dump and throw it off, which they did, leaving it among bushes and weeds, etc., *held* to sustain a conviction for receiving stolen goods under Act Feb. 13, 1913 (Comp. St. §§ 8603, 8604).
6. RECEIVING STOLEN GOODS ⟹3—BELIEF THAT GOODS WERE EMBEZZLED.
   When goods actually stolen came into accused's possession, the possibility that he considered them embezzled, instead of stolen, does not invalidate a conviction for receiving stolen goods, in violation of Act Feb. 13, 1913 (Comp. St. §§ 8603, 8604).
7. CRIMINAL LAW ⟹370—ADMISSIBILITY OF EVIDENCE—SIMILAR TRANSACTIONS.
   In prosecution for receiving stolen goods, in violation of Act. Feb. 13, 1913 (Comp. St. §§ 8603, 8604), testimony relating to a similar transaction a few days before *held* admissible to show accused's acquaintance with the thieves.

In Error to the District Court of the United States for the District of New Jersey; Thomas G. Haight, Judge.

Dominick Le Fanti was convicted of receiving stolen goods, and brings error. Affirmed.

For opinion below, see 255 Fed. 210.

Louis Morten, of Jersey City, N. J. (Melosh & Morten, of Jersey City, N. J., of counsel), for plaintiff in error.

Charles F. Lynch, U. S. Atty., and Samuel I. Kessler, Asst. U. S. Atty., both of Newark, N. J.

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Before BUFFINGTON and WOOLLEY, Circuit Judges, and DICKINSON, District Judge.

DICKINSON, District Judge. The following outline statement of facts presents the questions involved in this writ of error:

The defendant in the court below was a saloon keeper. Two boys had stolen a bale of silk. This they took to Le Fanti's saloon, to be turned over to him. He was, in the slang of the underworld, the "fence." They had before brought silk to him, for which he had afterwards paid them $120, or some such sum. When they brought the bale with which we are now concerned, they told him they had "another bale." He warned them that he and his place was being watched, and directed them to take the bale to "the dumps," and that he would follow them in his automobile to get it. He did follow and overtook them, and signaled them to go in the same direction he was going. Later on he signaled them to drop the bale, which they did, leaving it among some bushes or weeds. The boys then left the place, and the defendant returned to his saloon. The boys were taken into custody on their way back from the dump, and Le Fanti at his home. The silk was not found at his place, but was found where the boys had left it. There was no evidence that the stolen property had ever been in the actual, physical, personal possession of Le Fanti. The three were indicted jointly as receivers, and the guilty possession charged to be the possession of all. The stolen property was part of an interstate shipment, and no question of the federal character of the offense is raised. Le Fanti (who sued out this writ of error) was separately tried under the indictment; the other defendants not being at the time brought to trial.

The questions raised by the assignments of error (so far as they were raised at the trial) were raised by objections to the introduction of evidence, by motion to strike out evidence, by motions for a directed verdict, by requests for charge, and by exceptions to the charge of the court. The court afterwards, in order to give opportunity for a full argument of all the questions involved, allowed a rule to show cause why the verdict of conviction should not be set aside because of alleged errors. This rule was discharged, and the defendant sentenced. The opinion accompanying the discharge of the rule is reported in (D. C.) 255 Fed. 215. The propositions discussed by counsel for plaintiff in error will be considered in a different order from that of the several assignments of error on which they are based.

[1] One suggested at the argument at bar (although not discussed beyond its mere statement) was that, where two or more persons are jointly indicted, charged with having the guilty possession of stolen property, the prosecution must prove a joint possession, in order to warrant the conviction of any of the defendants. We find no reference to this broad proposition in the printed brief submitted, and no trace of it in any trial ruling which the trial judge was asked to make, nor is the proposition in this broad form to be found made the basis of any of the assignments of error. In consequence we assume the point involved not to be now made. This may be because

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it was not made during the trial, or because the plaintiff in error is content with the disposition made of it by the court below in refusing the defendant a new trial. At all events, it is in this form not before us. There is presented, however, a proposition which, to some extent at least, involves this in an amended form. It is laid down in the printed brief in the following form:

"Where two or more persons are charged jointly with having the possession of stolen property, the prosecution must prove a joint possession in order to warrant the conviction of the defendants; if the proofs show a separate and successive possession, then only the first offender can be convicted of having such possession."

The question which, in the view of counsel, is involved in the proposition thus formulated, is presented and discussed in several different forms. It is not entirely clear just what application the stated principle has to the facts of this case, nor, indeed, just how far the principle, as it is stated, is meant to go.

The argument proceeds upon the fact that the three persons indicted were jointly indicted, charged with the offense (stripped of its other features) of jointly receiving and having in their joint possession stolen property, etc., and upon the other fact that the proofs were that two of the defendants had stolen, and the other indicted defendant (the plaintiff in error) had received, and the conclusion reached is that "the defendants" could not be convicted under this indictment of receiving, because the proofs showed, not a joint possession, but separate successive possessions. The argument admits, however, that the "first offender can be convicted of having such possession."

Just what application the proposition, as above stated, has to the facts of this case, is not clear. It is coupled with the second proposition that the possession of the thief cannot be also held to be the possession of a receiver. Neither this second proposition, whether well or ill founded, nor the proposition above quoted, has any relation to the facts of this case, otherwise than in their possible bearing upon the proposition which counsel has dropped.

The plaintiff in error is charged in the indictment to have been a receiver. He was not shown to have been the original thief. The only bearing of either of the points attempted to be made is, in consequence, that as the other defendants were proved to have been the thieves, if their possession as thieves (as the second proposition asserts) negatived their possession as receivers, there could be no joint possession as receivers in them and the plaintiff in error

This brings us to the proposition which we have described as dropped. It means that no one of a number of defendants jointly indicted as receivers can be convicted without proof of a joint possession, and is the equivalent of saying that good pleading would require that, in addition to charging all the defendants with having the stolen property in their possession, they should be further charged so as to meet all the possibilities of any two or more (less than the whole number) having such possession, or any one of them having the property in his sole and separate possession. This is so because (if the proposition be sound), if more than one be charged with the of-

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fense of receiving, and the proofs indicated that any one of them had not been a party to the possession, all must be acquitted, although the guilt of the others was clear. It would also follow that, if there was a severance, and one defendant alone was on trial, the possession of all must be proved, or he must be acquitted, and the acquittal of any one of the defendants must work the acquittal of all.

This position was taken before the court below on the motion for a new trial, and was discussed and disposed of by the trial judge in a clear statement of his views. The position, as already stated, was not taken at the trial, and the question involved has not been presented to this court. The proposition first quoted, however, admits that "the first offender" may be convicted, and the cases cited in support of it show, what is very often the result of trials on joint indictments, that some of the defendants may be (and are) found guilty and the others indicted with them acquitted.

The propositions thus advanced can have no other bearing than whatever support they give to the propositions next discussed, involving and raising the questions of whether there was such possession in the plaintiff in error to constitute the crime of receiving, and whether the evidence of this possession was sufficient to warrant his conviction. This is the main point attempted to be made.

[2, 3] Several of the remaining propositions (based upon the third assignment) may be condensed and considered together. The effort made is to invoke the principle that a defendant, who is only shown to have intended to commit the crime of receiving, but who while in loco pœnitentiæ withdraws from the commission of the crime and refuses to be guilty of the act of receiving, cannot be convicted of that offense. This doctrine would be accepted without the cases cited in its support. It has, however, no application to the facts of this case as found by the jury. There is no room for such application, if the defendant on trial had possession of the stolen property. Such possession, therefore, is the turning point. The boys who stole the property had the actual physical possession. They surrendered this when they placed the bale of silk upon the dump and left it hidden in the weeds. One of three, or at least four, inferences is to be drawn. They deposited it in its hiding place so that they might return to get it. If so, they retained its possession. They put it where they did, so as to rid themselves of it. If so, they abandoned it. They left it where they did at the direction of the plaintiff in error in the act of its delivery or the transfer of its possession to him, leaving him in control and dominion over it. If so, he was in possession. It is not necessary that he should take manual possession of it. His possession was none the less real, and he the receiver of the property within the meaning of the statute, although such possession was constructive, and he had no opportunity to physically grasp it. The finding of such possession in him was made by the jury under evidence which not only warranted, but compelled, the finding.

The fourth possibility referred to is that the stolen property was hidden for the purpose of being placed in the possession of some one else. Of this there was no evidence.

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[4, 5] Another proposition is advanced to the effect that the evidence did not show the guilty knowledge on the part of the plaintiff in error, which is an essential element of the crime charged. The statute (Act Feb. 13, 1913, c. 50, 37 Stat. 670 [Comp. St. §§ 8603, 8604]) which makes the act charged a crime was passed to promote a policy of the law. The policy is to discourage thefts by making it difficult for the thief to dispose of stolen property. One dealing with property in the possession of another may deal with any one of several beliefs in mind. He may think the vendor to be the lawful owner of the property, or have other lawful right to sell. If such be his belief, he is not guilty of the crime of receiving, although the property be in fact stolen property. He may believe (and this is knowledge) that the one offering him the property is selling that of which he is not the owner, and of which he has no lawful right to dispose. He may not know from whom the property was stolen, or when it was stolen, or who stole it, or the circumstances under which it was stolen; but, if with the guilty knowledge in his mind that the real owner has been deprived of his property, it is bought or otherwise received, and the fact is that the property was stolen, the receiver may be found guilty of the crime defined in the statute under which the defendants were indicted in this case. Such a receiver cannot exculpate himself, because he might have thought that the property had been embezzled. If the property was in fact stolen, and there is that guilty knowledge in the mind of the receiver, which negatives the thought that he bought innocently what he thought he had the right to buy, the fact of actual theft, coupled with the fact of such guilty knowledge, supports a finding that he received the property knowing it to have been stolen. Inasmuch as the statute defines the crime as one including both the fact of theft and the fact of knowledge of the theft, it follows that, if there was no theft, the buying of the property is not criminal, even if the buyer believe the property to have been stolen.

[6] Here there was abundant evidence to find both the fact of theft and the knowledge of the receiver that the property had been stolen. The theoretical possibility (for this is all which is urged) that the information which brought home to him (as the jury has found) knowledge that the property was stolen, might have induced him to believe that the property had been embezzled, does not disturb either the fact finding that it was stolen or the fact finding that the receiver knew it. The trial judge, in the opinion filed in this case, has made the soundness of this ruling so clear that further comment or citation of other authorities than those cited by him is unnecessary.

The complaint of the charge of the court in the argument at bar (no trace of which is, however, to be found in the assignments of error) that the court had instructed the jury that the property had been stolen, instead of submitting the question of theft as one of fact to be found, is based upon a misunderstanding of the charge. The question was submitted and left wholly to the jury.

The complaints of the charge (voiced in the sixth and other assignments of error) have no other basis than the assignments of error which have already been considered. The charge was clear, fair,

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and impartial. Indeed, no fault is or could be found with it, if (as has been ruled) it was without error in its statement of the law.

[7] The only remaining assignment calling for comment is the first. The complaint is that evidence in the form of testimony was admitted of the fact that the defendant on trial had another transaction with his codefendants without proof that the property then bought had been stolen, or that the transaction was not an innocent one.

We see no error in the admission of this evidence. It was permissible to show all the knowledge which the receiver of this stolen property had. A part of his knowledge was his knowledge of the boys who brought him the silk. The previous sale was evidence of his acquaintance with them. They were not strangers. This fact bore upon the question before the jury. It was in itself a mere circumstance. It may have had very little, if any, appreciable value as evidence in itself. This, however, would go to the weight of the evidence, not its admissibility.

The prior transaction had another significance. The boys had brought and turned over to Le Fanti this first bale. There was no agreed sum which he was to pay them. He afterwards paid them $120 (or whatever the sum was). They afterwards brought the bale which figures in this indictment, and (as the jury has found) delivered it to him with the statement that this was "another bale." Had the instant transaction been an honest one and the defendant sued for the price, evidence of the former transaction would have been admissible as bearing upon the right of the vendors to receive the same price before paid. It, therefore, had a bearing upon the question of the sale of the stolen property, and because of this upon the question of its delivery and possession.

The assignments of error are all overruled, and the judgment of conviction and sentence affirmed.

(259 Fed. 465)

CITY ICE CO. v. YORK MFG. CO.

(Circuit Court of Appeals, Fifth Circuit. June 16, 1919. Rehearing Denied October 7, 1919.)

No. 3295.

PRINCIPAL AND AGENT ⚷101(1)—AUTHORITY OF AGENT TO SIGN CONTRACT—CONSTRUCTION OF CORRESPONDENCE.

Undisputed evidence, consisting of correspondence between defendant, a manufacturing company, and its agent, who had general authority to solicit contracts subject to approval by defendant, *held* to authorize him to bind defendant by the contract sued on, and to entitle plaintiff to an instructed verdict for the admitted refusal of defendant to perform such contract.

Foster, District Judge, dissenting.

In Error to the District Court of the United States for the Southern Division of the Northern District of Alabama; William I. Grubb, Judge.

Action by the City Ice Company against the York Manufacturing Company. Judgment for defendant, and plaintiff brings error. Reversed.

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This was an action by the plaintiff in error, City Ice Company, against the defendant in error, York Manufacturing Company, to recover damages for the alleged breach of a written contract to sell and deliver certain ice manufacturing machinery. The parties will be referred to as the Ice Company and the York Company, respectively. The case was tried on issues joined on pleas of non est factum and the general issue, with leave to present thereunder any special defense.

The following state of facts was shown by undisputed evidence: During the period covered by the dealings between the parties the Ice Company was a manufacturer of ice, doing business at Mobile, Ala., and the York Company was a manufacturer of ice-making machinery, having its factory and main office at York, Pa. Several months prior to the signing, as hereinafter stated, by an agent of the York Company, of the alleged contract, the Ice Company made it known to several manufacturers of ice-making machinery, including the York Company, that it contemplated the purchase of an ice manufacturing plant, consisting of two refrigerating machines, each having a capacity of 50 tons of ice per 24 hours, and additional capacity to maintain a temperature of 28 degrees Fahrenheit in storage room having 100,000 cubic feet capacity. A representative of the Ice Company visited York, and had interviews with representatives of the York Company, in which the former's desire to buy a 100-ton plant was mentioned. Following this, the York Company, on October 23, 1914, made and transmitted to E. R. Feagin, to be submitted by the latter to the Ice Company, two alternative estimates, consisting of lists of machinery and equipment, stating price for the same, but not mentioning capacity. Feagin was a traveling salesman of the Southern Construction & Supply Company of Atlanta, which was the York Company's agent for territory including Mobile, the terms of the agency being expressed in a written contract between the principal and agent, a provision of that contract being that among the duties to be performed by the agent are "to solicit orders for the machinery and apparatus which is manufactured, sold, or handled by the principal, and to submit the same to the principal for acceptance." On November 5th the York Company sent to Feagin three additional estimates, consisting of lists of machinery and prices for same, no mention being made of capacity. In a communication of the York Company to Feagin dated November 12th, inclosing a blueprint referred to as showing the 100-ton plant, it was said: "You will understand that these layouts are only preliminary, and, of course, are subject to change in case the proposition goes through." For about two weeks prior to November 27, 1914, Feagin was in Mobile, negotiating with representatives of the Ice Company for the sale of an ice plant to the latter. During most of that time the Ice Company was negotiating with other manufacturers of ice-making machinery, and the agents of the several manufacturers were actively competing for the business. While such negotiations were in progress the following correspondence took place:

"Day Letter.

"Mobile, Ala., Nov. 16th, 1914.

"York Mfg. Co., York, Pa.

"Mail special delivery today care Battle House detail prices your several estimates City Delivery Co., dated October twenty third propositions A and B also November fifth alternates Number one and two. Must have this information in order to make omissions as may be required give power requirements for auxiliaries in each case also best shipment and completion. Rush.

"E. R. Feagin."

"Western Union Telegram.

"Mobile, Ala., Nov. 16th, 1914.

"York Mfg. Co., York, Pa.

"Our price is about 10 per cent. higher. Will be offered contract below your price. Are you willing to accept. Advise by mail. See Day Letter.

"E. R. Feagin."

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"Battle House.

"Mobile, 11-16-14.

"York Mfg. Co., York, Pa.

"Gentlemen:

"Attention Mr. Strickler.

"I wired you today regarding the City Delivery Co. proposition.

"Had a long talk with Mr. Holcombe this morning and he says that everything being equal we will get the contract, however, the present prices are entirely out of the question. Hence my wire. I feel sure that we will have a little preference shown us, but not as much as the present propositions call for.

"I think the oil engines will be used, and it looks as if Nordberg has the advantage over Snow. It will also probably be a belt drive.

"Contract for engines will be let Wednesday, I think, and ice machinery on Thursday or Friday next, as mentioned in my wire, and think they will make me an offer on the job, if the price is out of line, before closing. And if it is anywhere near reasonable, I will sign it and send it in for your approval or disapproval.

"We must get it if there is a possible chance.

"Mr. Holcombe also advises that our regular terms, viz.: ¼ cash on shipment, ¼ on completion, balance in 6, 12 and 18 months, would very likely be satisfactory.

"I hope to send in the contract before leaving here.

"Yours truly, E. R. Feagin."

"November 16, 1914.

"Mr. E. R. Feagin, Care Battle House, Mobile, Ala.

"Dear Sir: We are in receipt of your Day Letter, also Telegram relative to the proposition for Mobile, Ala. We note in your telegram that our price is about 10 per cent. high, and that in all probability they will make you an offer on this proposition. We also note in your Day Letter that you want detailed estimates, also power required for the auxiliaries.

"This proposition is a large one and we feel that we should have all the information right here at the factory before we make any revised prices to these people.

"Immediately upon receipt of this letter, kindly wire us what proposition appears favorable to these people, and what omissions or additions they intend to make to the same. We will then be in a position to give you our best figure, also the horse power required for the different various auxiliaries.

"You will understand that a proposition of this nature should be gone into very carefully and you should not make any hasty guarantees or prices, and for this reason we feel that you should supply us with all the information, as fast as you receive it from these people, and keep us posted continually so that we can revise our quotations and give you the information in such a manner that we will at least be in the running, and if possible, secure the order. Yours truly, York Manufacturing Co."

"Western Union Night Letter.

"Mobile, Ala., Nov. 18—14.

"York Mfg. Co., York, Pa.

"Your letter sixteenth. At present bids are being received on original specifications using oil engines belted compressors drop pipe freezing system as per your estimate dated Nov. fifth marked alternate Number one with following changes: Use horizontal machines twenty standard condensers erecting engineer only omit electric generator and board insulation of tanks. This bid is for comparison with others my alternate proposition to them is (1915) system your alternate numbers two November fifth with above omissions and following changes use vertical high speed direct connected compressors hundred sixty revolutions they furnish oil engines on this also give price belted compressor contract probably be let Friday. Wire me detail follow with letters if you had given information as I asked in my wire I could have handled job as it is you have probably lost it by the delay. I am afraid I can't hold them off until mail reaches here. If I don't hear from you will do best I can to get it. Advise as soon as possible. E. R. Feagin."

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"Telegram.

"York, Pa., November 19, 1914.

"Mr. E. R. Feagin, Care Battle House, Mobile, Ala.

"Our estimates Mobile proposition dated October twenty-third. Proposition A deduct for gas engines, generator, switchboard and engine for same Thirty-six Thousand Dollars. If erecting engineer only furnished Three Thousand Dollars. Proposition B deduct for Snow oil engines, generator and engine for driving same Thirty-two Thousand Dollars; erecting engineer only Three Thousand Dollars. Original price did not include tank insulation.

"York Manufacturing Company."

"November 19, 1914.

"Mr. E. R. Feagin, Care Battle House, Mobile Ala.

"Re: City Ice Delivery Co.

"Dear Sir: We are in receipt of your day letter relative to the above proposition. We have just wired you as per the enclosed confirmation.

"We note in all your correspondence you refer to our estimate of November 5th. We are unable to locate this estimate, as our proposition is dated October 23rd.

"Proposition 'A' covers the '1915' style raw water freezing system, with 16-inch x 24-inch belt driven compressors, and Rathbun-Jones Gas Engines, with Smith Producers. We instructed you that if the gas engines for driving the machines were omitted, also the generator and switchboard, as well as the gas engine for driving the generator, and if we furnished an erecting engineer only, in place of complete erection, you could deduct a total of $39,000.00.

"Proposition 'B' is for same outfit, using, however, high speed vertical compressors, direct connected to oil engines, and on this proposition if the engines were omitted, also the generator and switchboard, and engine for driving the generator as well as complete erection, you could make a reduction of $35,000.00.

"Our original proposition did not include any insulation for the freezing tank.

"We are enclosing photographs of a 50-pound block of ice which we made from the water sent us. The water above the squaring plates as the block was frozen was almost the color of coffee, but you will note, however, that the block is very clear. We packed this block in a barrel, surrounded with granulated cork, and are shipping the same to the City Ice Delivery Company today, by express. Of course, we cannot guarantee that the same will arrive in good condition.

"Of course, if they make you an offer on this proposition you had better sign up, and we can then take the specifications, go over the same very carefully, and can either accept or reject the proposition according to the price secured.

"Yours truly, York Manufacturing Co."

"Battle House, Mobile.

"11-20-14.

"York Mfg. Co., York, Pa.

"Gentlemen:

"Attention Mr. Strickler.

"Enclosed find copy my estimate for the City Delivery Co.

"The price of $37,095.00 is about $3,150.00 too high, as compared with Frick. Triumph is still lower, but his price and proposition I don't think will be seriously considered.

"Are you willing to meet Frick on this job?

"You will note that my estimate I have taken off the extra 5 per cent. in nearly all figures, but still can't get down. I hope to hold it open till Monday although it is very likely the contract will be let Saturday. I understand that Frick has instructions to get the contract, and they are figuring accordingly.

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"The job is too good for us to pass up if possible to get it.

"If they decide on my proposition as per estimate I think they will no doubt change to the '1915' raw water system, at the higher price, viz., about $3,300.00 more than my estimate, and also put 32,000 ft. of coils in tank at an extra price.

"Kindly check over the estimate and see if you will be willing to make a better price.

"Will wire you night letter Sunday night, if proposition is still open.

"Yours truly, E. R. Feagin, Battle House, Mobile, Ala."

[Enclosed with the letter last above copied was a list of materials and machinery, with the prices therefor. (Record, pp. 188–9).]

"11–21.

"York Mfg. Co.

"Gentlemen:

"Attention Mr. Strickler.

"Reference City Del. Co. job.

"Wish to advise I have had another session with them today since writing you last night enclosing my estimate, as a result I find out that De La Vergne is high. Our price $38,000.00 is next; the next price is $33,950.00 (either Frick or Artic), and Triumph $31,000.00 and each one has asked for a chance to cut it. Necessary to secure the order. Where in H– do we get off?

"Mr. Holcombe promised me the refusal of the job before finally closing, and he personally would give me the order at my present price but our Austrian friend says we must meet the lower price. So you see what I am up against.

"Yours truly, E. R. Feagin."

"'Western Union Night Letter.

"Mobile, Ala., Nov. 22nd, 1914.

"York Mfg. Co., York, Pa.

"Referring to my estimate mailed twentieth will you be willing to make ten per cent. cut. Will take at least this much to get contract. If possible to do so wire me quick. Also see my letter twenty-first. Must have this business. Answer care Battle House. E. R. Feagin."

"W. U. Telegram.

"York, Pa., November 23, 1914.

"Mr. E. R. Feagin, Care Battle House, Mobile, Ala.

"Can close City Ice Delivery proposition per your estimate at Thirty-four Thousand Dollars, subject to our approval.

"York Manufacturing Company."

"Western Union Night Letter.

"Mobile, Ala., Nov. 23, 1914.

"York Mfg. Co., York, Pa.

"Have refusal, Thirty-Thousand even as per my estimate mailed you. Above is Vilter proposition. Have compared specifications personal. They furnish Twenty-two Thousand feet extra heavy coils, Sixteen Thirty Two compressors balance same as ours using either drop pipe or hexamer patent pump as selected. Vilter making this offer personally. Shall I sign. Must know by noon Tuesday. Answer quick. E. R. Feagin."

"Western Union Day Letter.

"Nov. 24, 1914.

"Mr. E. R. Feagin, Care Battle House, Mobile, Ala.

"Get contract best figure possible, take thirty thousand if can do no better. Vilter is undoubtedly figuring on steel pipe, light covers and gang air connections to cans. Do not specify any more details than necessary so we can furnish same class material as Vilter. Get copy their specifications if possible. York Manufacturing Co."

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"Western Union Night Telegram.

"Mobile, Ala., Nov. 23rd, 1914.

"York Mfg. Co., York, Pa.

"Will you consider splitting contract with Vilter, each taking complete fifty ton. Answer. E. R. Feagin."

"Western Union Telegram.

"Nov. 24, 1914.

"Mr. E. R. Feagin, Care Battle House, Mobile, Ala.

"Do not care to split contract with Vilter unless we can get good price for plant. York Manufacturing Co."

"Western Union Telegram.

"Mobile, Ala., Nov. 24–14.

"York Mfg. Co., York, Pa.

"Must have authority to close contract without delay fully guaranteeing acceptance. Financial conditions considered good. Competitors have given this. Answer quick. E. R. Feagin."

"Western Union Day Letter.

"Nov. 25, 1914.

"Mr. E. R. Feagin, Care Battle House, Mobile, Ala.

"Have wired City Ice Delivery Company guaranteeing to accept contract signed by you provided satisfactory financial report accompanies same. As this gives you full authority be careful not to tie us up on special apparatus or guarantees. York Manufacturing Co."

"Western Union Day Letter.

"Nov. 25, 1914.

"City Ice Delivery Company, Mobile, Ala.

"We hereby authorize Mr. Feagin to sign contract with you and will guarantee to accept contract so far as price is concerned, but satisfactory financial reports must accompany contract as we have no statement of your financial condition, nor are you rated in Bradstreets. York Manufacturing Co."

"Western Union Night Letter.

"Mobile, Ala., Nov. 26, 1914.

"York Mfg. Co., York, Pa.

"Before I can get signatures to contract they insist on absolute guarantee of acceptance financially and otherwise. Have gotten following reports. City Ice Co. organized and charted December last. Reorganized this Fall. Have Twenty-Five Thousand paid in capital. Tripo Chiepalich President and principal owner, M. Chiepalich Vice-President, R. L. Holcombe, Secretary and Treasurer. Banks advise Tripo Chiepalich worth about Seventy-Five Thousand and all concerned considered good moral risks. Am getting further reports from Bradstreet and Banks. Wire full authority to sign at once. Must leave here noon Friday. Wire me personally quick. E. R. Feagin."

"Western Union Telegram.

"Nov. 27, 1914.

"Mr. E. R. Feagin, Care Battle House, Mobile, Ala.

"We hereby give you full authority to sign City Ice Company contract provided they give bonds in security for deferred payments, or officers personally guarantee payments, bonds in ten per cent. in excess of amount of deferred payments to be given. York Manufacturing Co."

"Western Union Telegram.

"Mobile, Ala., Nov. 27–14.

"York Mfg. Co., York, Pa.

"Party will not sign except on straight proposition no bonds or personal guarantees. Terms payment to be fourth cash, fourth completion, balance six and eighteen months. Answer quick. E. R. Feagin."

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"Western Union Telegram.

"Nov. 27, 1914.

"E. R. Feagin, Battle House, Mobile, Ala.

"You are authorized to sign City Ice Company contract in our name.

"York Manufacturing Co."

Where the name City Delivery Company appears in the above correspondence it means the Ice Company. The latter conducted a department of its business under the first-stated name. On November 27th a written contract for the sale by the York Company to the Ice Company of two ice-making units was signed in the name of the former by Feagin, and in the name of the latter by its president and secretary and treasurer. That instrument contained the following provisions: "The York Manufacturing Company hereby guarantees that each machine consisting of the herein described engine and gas pump, under test will give a duty equal to the manufacture of 55 tons of ice in twenty-four hours, when operating under 15.67 pounds back pressure and 185 pounds condensing pressure, and at 68 R. P. M. [meaning revolutions per minute]. * * * The York Manufacturing Company guarantees that the above freezing system (can system Nos. 1 and 2) under test will have an ice-making capacity of 110 tons of ice per day of 24 hours each, each ton to consist of five blocks, with the water entering the case at 40 degrees or less, when properly and continuously operated, and said ice to be suitable and merchantable for all domestic purposes. * * * 1292 galvanized freezing cans, size 14½"x14½"x necessary length. Cans will weigh about 100 pounds each, and have a capacity to make a block of ice to weigh about 440 pounds in cans."

Following provisions for the York Company furnishing a specified number of feet of piping, to be so connected with the refrigerating system that when such system is operated as specified it would maintain a stated temperature in an ice-storage room having a capacity of 100,000 cubic feet, and for that company furnishing a machine for holding such temperature in that room 'when large machines are not running,' the contract contained the following provision:

"The York Manufacturing Company guarantees the following performance: That the said piping, under test, when operated in full and continuous operation, will cool the rooms, apartments, cellars, or spaces as specified in the preceding table, and aggregating in the sum total 100,000 cubic feet of space provided that the rooms, apartments, cellars, or spaces are properly insulated and used with proper care, that the work be properly distributed throughout, and that the total work to be done in same does not exceed 12 tons of ice melting capacity per twenty-four hours of continuous operation. * * * The party of the second part (the Ice Company) has the option for fifteen days from this date within which to change this agreement in such manner as to substitute for the machinery and equipment herein contracted for like machinery of sufficient capacity to produce 55 tons of ice per day of 24 hours, and to that end only such of the machinery described in the attached specifications as is necessary to complete one unit instead of two units as there provided for shall be furnished and installed, except, however, that if such change be made the following stipulations are agreed to."

The "following stipulations" provided for stated changes in equipment, and for the amount to be paid by the Ice Company being one-half of what that amount was to be if the change should not be made, with $50 added to such one-half. When the York Company was apprised of the contents of the instrument signed in its name by Feagin it refused to comply with it and gave notice of such refusal to the Ice Company. The following are extracts from the testimony of George Braungart, a witness for the York Company: "This contract calls for a 16½ by 24 vertical single acting compressor, running at 68 revolutions, with 15.67 pounds back pressure and 185 pounds head pressure. Under those conditions the machine would have an actual ice-making capacity of 49 tons." "There is nothing, as a practical proposition, to prevent them from running the machine faster than 68 revolutions a minute, and if they would run it faster it would produce more ice." Testimony of other witnesses for the York Company was to the effect that the capacity of each of the two

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ice-making units mentioned in the contract, when the ammonia air compressor is operated at 68 revolutions per minute, and under other conditions stated, had a capacity of 49 tons of ice a day; that by increasing the number of revolutions per minute more ice would be made, and less would be made if the number of revolutions is decreased; and that each unit would make 55 tons of ice per day with the required increase of the number of revolutions of the compressor, such increase being practicable, but requiring the use of more power. The court refused to give the following charge requested by the plaintiff, the Ice Company: "The court charges the jury that if you believe the evidence in this case your verdict must be in favor of the plaintiff."

At the request of the defendant, the York Company, it gave the following charge: "The court charges the jury that if they believe from all the evidence in this case that E. R. Feagin had no authority to bind the defendant under contract, their verdict must be for the defendant." Exceptions were reserved to the above-mentioned and other rulings, the effect of which was to leave it to the jury to determine whether Feagin was authorized to bind the defendant by the contract the alleged breach of which was complained of.

T. M. Stevens, of Mobile, Ala. (Tillman, Bradley & Morrow, of Birmingham, Ala., and Stevens, McCorvey & McLeod, of Mobile, Ala., on the brief), for plaintiff in error.

H. C. Niles, of Kosciusko, Miss., and A. G. & E. D. Smith, of Birmingham, Ala., for defendant in error.

Before WALKER and BATTS, Circuit Judges, and FOSTER, District Judge.

WALKER, Circuit Judge (after stating the facts as above). In behalf of the York Company it was contended that its telegram of November 27th to Feagin, "You are authorized to sign City Ice Company contract in our name," had reference to such a 100-ton ice plant as had been the subject of previous negotiations, and did not confer on him authority to bind the York Company by such a contract as the instrument signed evidences. The rulings complained of resulted from the conclusion reached by the court that under the evidence adduced it was open to the jury to find that the words "sign City Ice Company contract" had reference only to a contract for a 100-ton plant, with means of keeping at freezing temperature 100,000 cubic feet of storage space, as contemplated in preceding negotiations, and that the telegram did not authorize Feagin to bind the York Company to a contract which gave the Ice Company the option to take either a 110-ton plant or a 55-ton plant. The nature and scope of Feagin's agency, as it existed before the just-mentioned telegram was sent, were disclosed by undisputed evidence. It was shown by uncontroverted testimony that Feagin was the duly authorized representative of the Southern Construction & Supply Company, upon which the York Company, by written instrument, had conferred authority "to solicit orders for the machinery and apparatus which is manufactured, sold, or handled by the principal, and to submit the same to the principal for acceptance." Before the sending of the telegram of November 27th, Feagin, as the representative of his immediate principal, was authorized to solicit and submit to the York Company for its acceptance such an order for machinery as the contract sued on embodies, whether such an order had or had not been the subject of previous negotiations. It seems that such a telegram as that of No-

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vember 27th, sent to one already having the authority just mentioned, had the effect of so enlarging that authority as to make it one to solicit and accept in behalf of the York Company such an order as the instrument signed embodied, whereas before the authority possessed by the addressee of the telegram did not extend beyond soliciting such an order and submitting it to the York Company for acceptance, and that the evidence was such as not to leave it open to find otherwise. The fact that the agent kept in touch with and consulted the principal while the negotiations were in progress does not indicate that prior to the sending of the telegram of November 27th the former did not, as to his dealings with the Ice Company, have the authority conferred by the agency contract. It was against the interest of both agent and principal for the former's efforts to result in obtaining an order which the latter would not accept.

But it may be assumed, without being admitted, that when Feagin went to Mobile he was clothed only with authority to negotiate for the sale of such machinery as the Ice Company had indicated a desire to buy—a 100-ton ice plant and incident means of maintaining 100,000 cubic feet of storage room at or below a freezing temperature. It is contended that that authority was exceeded when the agent undertook to bind the principal to furnish a 110-ton ice-making plant. The uncontradicted testimony showed that the ice-making plant called for by the contract, when operated as and under the conditions therein specified, makes, not 110 tons, but 98 tons, of ice per day. That testimony further showed that that plant would make more or less than 98 tons of ice a day according as the ammonia air compressor is run at a speed of more or less than 68 revolutions per minute, the other stated conditions being the same, and that it is entirely practicable to increase or diminish within a considerable range the number of revolutions per minute above or below the number mentioned in the contract, the product per day being substantially three-fourths of a ton more or less than 49 tons for each revolution in addition to or less than 68, the other stated conditions being the same. It seems that it cannot with any propriety be said that a machine does not answer a call for a 100-ton one when it is equally capable of being so operated as to produce that amount, or more or less than that amount, per day, according as part of it is speeded up or slowed down within entirely practicable limits; and that an agent's sale of such a machine, which, when operated at a speed and under conditions specified in the contract of sale, makes slightly less than 100 tons of ice per day, cannot properly be said to be beyond the scope of an agency to sell a 100-ton machine because the contract contains a warranty that the machine when so operated will make 110 tons of ice a day, or substantially more than in fact it will make when so operated. Such a sale is not of a thing other than the one the agent was authorized to sell, whether the warranty does or does not subject the seller to liability for a breach of it.

Based on the provisions as to capacity to maintain a freezing temperature in storage room having 100,000 feet capacity, and as to the cans to be furnished having a capacity to make blocks of ice weigh-

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ing 440 pounds, contained in the instrument signed by Feagin, it was contended in behalf of the York Company that the ice-making machinery called for was guaranteed to have a capacity of even more than 110 tons per day, and that Feagin exceeded the authority conferred on him in undertaking to bind the York Company by such provisions. If the provision as to the capacity of what was called for to maintain a freezing temperature in the storage space mentioned had the effect of guaranteeing additional ice-making capacity, yet such a provision must have been in the contemplation of the York Company from the beginning, as the Ice Company's written request for bids called for bids on "two refrigerating machines, each of which will have a capacity of 50 tons of ice per 24 hours, and additional capacity to maintain a temperature of 28 degrees F. in storage room having 100,000 C. F. capacity." From the fact that the cans to be furnished were to have a capacity to make blocks of ice weighing about 440 pounds it does not follow that the above-quoted guaranty of the ice-making capacity of the freezing system can be given a meaning different from the one expressed by its language. The language of the provisions, taken together, cannot be given the effect of guaranteeing an ice-making capacity of more than 110 tons of ice per day of 24 hours. The guaranty clause in question says each ton "to contain five blocks." It does not say that each block shall be more than a fifth of a ton. The average weight of five units together making a ton is one-fifth of a ton. A fifth of a ton or less of ice may be made in a can having a capacity to make more than that amount. Ice-making capacity of more than 110 tons is not called for by a guaranty of a capacity of only 110 tons.

Even if the authority originally conferred on Feagin was limited to negotiating for the sale of a 100-ton ice-making plant, the correspondence between him and the York Company, after the former reached Mobile, unequivocally shows that the latter, while the negotiations were in progress, recognized that Feagin was empowered to make changes, omissions or additions required by the Ice Company, to give guaranties, and to stipulate for special apparatus not included in any specifications or bid previously submitted. That the "full authority" explicitly mentioned in the York Company's telegram of November 25th was not intended to be limited to negotiations for an order for a 100-ton plant is shown by its telegram of the day before in reply to the one of Feagin inquiring, "Will you consider splitting contract with Vilter, each taking complete fifty ton?" The York Company's statement, made in its reply, "Do not care to split contract with Vilter unless we can get good price for plant," is inconsistent with the existence of an intention on its part to limit Feagin's authority to negotiating for an order for a 100-ton plant, and shows that it contemplated the possibility of the negotiation resulting in Feagin getting an order for an ice-making machine having a capacity of substantially less than 100 tons a day. In view of that correspondence and the attending circumstances, the York Company's telegram of November 27th, "You are authorized to sign City Ice Company contract in our name," must be regarded as empowering Feagin

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to bind the York Company by a contract for whatever he previously had been authorized to obtain an order for.

The conclusion is that the uncontradicted evidence—written instruments and correspondence to which the York Company was a party and undisputed oral testimony—shows that Feagin was authorized to bind the York Company by the contract sued on. The existence of such contract and a breach of it being so shown, the Ice Company was entitled to have the jury instructed to find a verdict in its favor. The court erred in refusing the plaintiff's request for an instruction to that effect. Because of that error, the judgment is reversed.

FOSTER, District Judge (dissenting). The rule is well settled that when a contract contains technical terms parol is admissible to explain such. Evidence was admitted without objections on this question, was all one way, and conclusively showed that in the opinion of the experts the contract was not for a 100-ton plant. The court charged the jury the contract was not for a 100-ton plant. With that I agree. If there was nothing else, the option to take only one-half of the plant destroyed the contract as one for a 100-ton plant. Further, I am unable to follow the majority opinion in distinguishing the guaranty that the plant would produce 110 tons of ice every 24 hours from the balance of the contract.

On the question of Feagin's authority to make the contract, it was clearly shown that he departed from the specifications sent him, and contracted for certain items of machinery and apparatus never contemplated by the previous negotiations, and not regularly manufactured by defendant. The defendant had no knowledge of the changes until it received the signed contract. It was further shown that Feagin received a check for $250, which was not mentioned in the contract. The evidence as to the purpose for which this check was given is conflicting, but the jury may have concluded it was intended for a bribe to induce Feagin to make the unauthorized changes in the specifications. Negotiations between the parties extended over a period of four months, and there were personal interviews between the principals as well as between the plaintiffs' agents and Feagin, in addition to the extensive correspondence. Feagin's authority could not well be predicated upon one or two letters or telegrams, or in fact on less than all the evidence. The impression made upon my mind by the evidence is that Feagin was overreached by the plaintiffs' agents in the final making of the contract, and was induced to sign a document specifying a plant such as was never contemplated by the previous negotiations.

Conceding that the evidence was not disputed, the minds of reasonable men might well have differed as to the conclusions to be drawn from it, and, such being the case, the question of Feagin's authority to make the contract sued on was clearly for the jury. Therefore the action of the District Court in submitting that question to them was right.

Entertaining these views, I am obliged to respectfully dissent.

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(259 Fed. 476)

PHILADELPHIA & R. RY. CO. v. McKIBBIN.

(Circuit Court of Appeals, Third Circuit. June 24, 1919.)

No. 2470.

1. APPEAL AND ERROR ⟹1005(3)—REVIEW—QUESTION OF FACT.
A verdict on conflicting evidence approved by the trial court is conclusive on Court of Appeals.

2. MASTER AND SERVANT ⟹278(6)—INJURIES TO SERVANT—SAFETY APPLIANCE ACT—EFFICIENCY OF COUPLERS—EVIDENCE.
In an action under federal Employers' Liability Act 1908, as amended (Comp. St. §§ 8657–8665), for injuries from failure to provide a workable coupler as required by Safety Appliance Act of March 2, 1893, as amended by Act April 1, 1896, and Act March 2, 1903 (Comp. St. §§ 8605–8615), evidence of repeated and unsuccessful efforts by an experienced railroad man to operate the lever of an automatic coupler, when there are no circumstances consistent with its being in repair and workable condition to explain the inability to successfully operate it, is sufficient, without other evidence of its defective condition, to permit the inference that the coupler was defective.

3. TRIAL ⟹194(19)—INJURIES TO SERVANT—INSTRUCTIONS—THEORY OF CASE.
It is proper to refuse a requested instruction in servant's personal injury action when the granting of the request would have required the jury to disregard plaintiff's testimony, and to accept defendant's testimony as to how and when the accident happened.

4. DAMAGES ⟹96—EXCESSIVENESS—DISCRETION OF COURT.
That the judge in a personal injury action has on a previous trial reduced a verdict for plaintiff, but has failed to make a like reduction on a second trial does not evidence a clear abuse of discretion on refusing to reduce damages or to grant a new trial, where nearly two years' interest has accrued since the first trial, economic conditions had changed, and the difference between the amount awarded and that considered proper on the first trial was small.

In Error to the District Court of the United States for the District of New Jersey; J. Warren Davis, Judge.

Action by Robert J. McKibbin against the Philadelphia & Reading Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Frank S. Katzenbach, Jr., of Trenton, N. J., for plaintiff in error.
Joseph A. Shay, of New York City, for defendant in error.

Before BUFFINGTON, WOOLLEY, and HAIGHT, Circuit Judges.

HAIGHT, Circuit Judge. The defendant in error recovered a judgment in the court below against the plaintiff in error for damages resulting from personal injuries which he received while in the employ of the latter, as a brakeman, in its yards at Port Reading, N. J. The action was brought under the federal Employers' Liability Act of 1908 and Supplements (Act April 22, 1908, c. 149, 35 Stat. L. 65; Act April 5, 1910, c. 143, 36 Stat. L. 291 [Comp. Stat. 1916, §§ 8657–8665]), and was based upon the alleged negligence of the defendant (the plaintiff in error), in failing to provide a car, which the plaintiff claims he was required to uncouple in the performance of his duty as a

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brakeman, with a workable coupler, as required by the Safety Appliance Act of March 2, 1893, c. 196, 27 Stat. 531, as amended by the Act of April 1, 1896, c. 87, 29 Stat. 85, and Act March 2, 1903, c. 976, 32 Stat. 943 (Comp. St. §§ 8605–8615), and the negligence of certain of defendant's employés in failing to stop the train, from which the plaintiff claims he was required to uncouple two cars, when signaled to do so. It is conceded that, at the time the plaintiff was injured, he was employed in interstate commerce by the defendant, a common carrier by railroad, engaged in such commerce. Hence the federal Employers' Liability Act and the Safety Appliance Acts are applicable to the case. If therefore his injuries were the result of negligence on the part of his fellow servants, he may recover therefor. If, on the other hand, they were due to a defective coupler on one of the cars which he was required to uncouple, the fact that the same was defective, although the defendant may have exercised all the care to have had the same in proper condition, was such negligence as, under the Employers' Liability Act, by reason of the Safety Appliance Acts, entitled him to recover for the injuries which he sustained thereby. San Antonio Ry. v. Wagner, 241 U. S. 476, 484, 36 Sup. Ct. 626, 60 L. Ed. 1110; Texas & Pacific Ry. v. Rigsby, 241 U. S. 33, 43, 36 Sup. Ct. 482, 60 L. Ed. 874.

We now proceed to an examination of the assignments of error relied upon, in the light of these general observations. The defendant advances four reasons why the judgment below should be reversed. These will appear as they are hereafter discussed.

1. It is first urged that the plaintiff's version as to how the accident happened (which must have been accepted by the jury, in order to entitle the plaintiff to recover), "is contradicted by physical facts," and that the judgment should for that reason be reversed. At the outset of the discussion of this point, it should be noted that the trial court declined to set aside the verdict as contrary to the weight of evidence. In reality, therefore, the defendant is seeking to have the action of the trial judge in that respect reviewed. Without wishing to be understood as conceding or intimating that a federal court of appeal may, on writ of error, reverse a judgment because it is based upon a verdict contrary to the "physical facts" in the case, except it be possibly, on the theory that the refusal of a trial judge to set aside such a verdict amounts to a clear abuse of the discretion which the law vests in him (James v. Evans, 149 Fed. 136, 141, 80 C. C. A. 240 [C. C. A. 3d Cir.]), it is, we think, sufficient for the purposes of this case merely to state that a careful reading of the record discloses that the so-called "physical facts," which the defendant claims conclusively controvert the plaintiff's version of the accident, were themselves controverted and depended for their establishment upon the acceptance by the jury of the testimony of some of the defendant's witnesses who testified to them, and the rejection of the plaintiff's testimony, either in respect to their existence or in explanation of the apparent inconsistency between some of them and the plaintiff's version of how the accident happened.

[1] It is therefore apparent that we are asked to weigh the conflicting evidence in the light of the probabilities, and thus to invade the

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exclusive province of the jury, and, on an application for a new trial, of the trial judge. This we may not do. Erie Railroad Co. v. Schmidt, 225 Fed. 513, 515, 140 C. C. A. 655 (C. C. A. 3d Cir.); Humes v. U. S., 170 U. S. 210, 18 Sup. Ct. 602, 42 L. Ed. 1011; Herencia v. Guzman, 219 U. S. 44, 31 Sup. Ct. 135, 55 L. Ed. 81; Texas & Pacific R. R. Co. v. Harvey, 228 U. S. 319, 325, 33 Sup. Ct. 518, 57 L. Ed. 852. It is not urged or suggested that there was a clear abuse of discretion on the part of the trial judge in declining to grant a new trial on the ground that the verdict was contrary to the weight of the evidence; but if such had been the defendant's insistment, or if the effect of its present contention amounts to the same thing, which we think it does, we would be unable to find any such abuse of discretion on his part, in view of the conflict in the evidence, involving, as it does, the credibility of witnesses, without disregarding the rule before referred to, that on writ of error we are precluded from considering the weight of the evidence, if there was any evidence to go to the jury in support of the verdict.

2. It is next urged that there was not sufficient proof of a defective coupler on the car which plaintiff claims caused his injury to warrant the submission of the defendant's negligence to the jury on the theory that it had violated the Safety Appliance Acts. It is true that the only evidence on that point was that given by the plaintiff himself to the effect that he tried three times to operate the lever which is designed to open the coupler and thereby uncouple the cars, and that it would not work. In connection with that evidence, however, it must be borne in mind that the plaintiff was an experienced railroad man, who had been working as a brakeman for about six years previous to the accident and was accustomed to operate couplers such as was installed on the car in question; that the car was being pushed; that, so far as the evidence discloses, it was not on a curved track; and that there was no evidence which would explain the apparent defective condition of the coupler, which it would be otherwise permissible to infer from the fact that it did not work. It is true that several witnesses for the defendant testified that the lever on a car which they tested immediately after the accident, and which car they claim caused plaintiff's injury, did work properly, but they referred to a different car than that which the plaintiff referred to. Their version as to how and where the accident happened was radically different from the plaintiff's version. If the jury believed the plaintiff's testimony as to how and where he was injured (as the verdict establishes that they did), then they were justified in disregarding all of the testimony of the defendant's witnesses which related to the coupler on the car in respect to which they testified. There was also evidence that the coupler on the car referred to by the plaintiff had been tested, as had all other cars in the yard, some time prior to the accident by a car inspector; but as to exactly when such inspection took place, the extent of it, etc., the evidence was uncertain.

[2] The case then presents the question whether the repeated and unsuccessful efforts, by an experienced person, to operate the lever of an automatic coupler, when there are no circumstances consistent

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with its being in repair and workable condition to explain the inability to successfully operate it at a given time when, under the statute, it should be in working order, without other evidence of its defective condition, is sufficient to permit the inference that the coupler was not not in the condition required by the statute when the efforts to operate it were made. This question has received an affirmative answer by the Circuit Court of Appeals of the Sixth Circuit in Nichols v. Chesapeake & Ohio Ry. Co., 195 Fed. 913, 917, 115 C. C. A. 601. With the conclusion thus reached we are in accord. We do not wish to be understood, however, as holding what seems to have been conceded in Chicago, R. I. & Pac. Ry. Co. v. Brown, 229 U. S. 317, 320, 33 Sup. Ct. 840, 57 L. Ed. 1204; and what the Court in San Antonio Ry. v. Wagner, 241 U. S. 476, 484, 36 Sup. Ct. 626, 629 (60 L. Ed. 1110), expressly found it unnecessary to determine, "that the failure of a coupler to work at any time sustains a charge that the [Safety Appliance] act has been violated"; nor do we wish to be understood as intimating any opinion upon that question. We merely decide that the failure of the coupler to work under the circumstances above detailed is some evidence, the weight of which is for the jury under all the circumstances of a given case, that the coupler was not in the condition required by the act, when the plaintiff was injured.

[3] 3. The next error assigned is the refusal of the trial judge to charge one of the defendant's requests. We think that he was entirely right in declining to do so, either in substance or as actually phrased. The evidence does not disclose that there was such a coincidence between the time when the engineer was notified that the sand pipe of his engine was dragging, and the time when, according to the plaintiff's testimony, the brakeman on the train signalled the engineer to stop the engine, as would relieve the latter's failure to observe the signal of the imputation of negligence. Moreover, if the jury believed the plaintiff's evidence, the engine did not come to a stop until long after the stop signal had been given. The granting of the request would therefore have required the jury to disregard the plaintiff's testimony as to when the signal to stop was given by the brakeman and to have accepted defendant's testimony, that the signal to stop was not given until after the accident, and that, in turn, would have required the jury to cast aside the plaintiff's whole version of how and where the accident happened.

[4] 4. The last assignment of error is based upon the refusal of the trial judge to grant a new trial or reduce the amount of the verdict upon the ground that it was excessive. The contention in this respect is predicated upon the proposition that the refusal amounted to an abuse of discretion, and proceeds on the theory that as the amount of damages awarded by the jury was in excess of the amount to which the trial judge had reduced a verdict rendered on a previous trial, his failure to make a like reduction in the verdict rendered on the second trial, evidences a clear abuse of discretion. We are unable to assent to this view. The fact that nearly two years' interest had accrued on the amount which the trial judge considered on the first trial was not excessive, and the change in economic conditions between the time of

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the second trial and the first trial fully justified him in declining to reduce the verdict to the amount which he felt was proper at the time of the first trial. Moreover, and quite irrespective of those facts, he was fully justified in declining to reduce the amount of the verdict on the second trial when the difference between it and the amount which he had considered proper on the first trial was comparatively small.

Finding no error in the record, the judgment below is affirmed, with costs.

(259 Fed. 480)

CRANE v. UNITED STATES.*

(Circuit Court of Appeals, Ninth Circuit. July 7, 1919.)

No. 3255.

1. POST OFFICE ⟹48(4)—OFFENSE—INDICTMENT.
   An indictment, charging that defendant devised a scheme and artifice to defraud, and used the mails in carrying out the scheme, which consisted of representations of supernatural powers, *held* sufficient to charge an offense.
2. INDICTMENT AND INFORMATION ⟹121(2)—BILL OF PARTICULARS.
   An indictment, charging that defendant devised a scheme and artifice to defraud, and used the mails in connection therewith, *held* to plainly and fairly give defendant information of what he must be prepared to meet, and so he was not entitled to a bill of particulars.
3. POST OFFICE ⟹49—OFFENSE—EVIDENCE—SUFFICIENCY.
   In prosecution for devising a scheme and artifice to defraud and using the mails in connection therewith, which scheme consisted of representations by defendant that he was gifted with supernatural powers, evidence *held* sufficient to sustain a conviction.
4. CRIMINAL LAW ⟹789(9)—INSTRUCTION—REASONABLE DOUBT.
   Where the jury was charged that defendant must be proven guilty beyond a reasonable doubt, and that reasonable doubt is such as leaves the minds of the jurors in that condition that they cannot feel an abiding conviction to a moral certainty of defendant's guilt, it was not error to further charge that the prosecution was not called upon to make the case free from any possible doubt by proving defendant's guilt to an unassailable demonstration.
5. CRIMINAL LAW ⟹829(9)—INSTRUCTION—REFUSAL OF REQUEST.
   Where the instructions charged that the presumption of innocence, that finding of the indictment was not proof of guilt, and that suspicion or probability of guilt would not justify conviction, the refusal of a requested instruction that the jury could not convict because defendant had been arrested on the charge preferred was not error.

In Error to the District Court of the United States for the First Division of the Northern District of California; Maurice T. Dooling, Judge.

Arthur Crane was convicted of devising a scheme and artifice to defraud and using the mails in carrying out the scheme, and he brings error. Affirmed.

The defendant was indicted under section 215 of the Criminal Code of the United States (Act March 4, 1909, c. 321, 35 Stat. 1130 [Comp. St. § 10385]), and convicted under 15 of 20 counts for having devised a scheme and artifice to defraud, and to obtain money and property by means of certain false pretenses, representations, and promises, and by means of hypocritical

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*Rehearing denied October 14, 1919.

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doctrines written and advocated by him, and of using the mails of the United States in carrying out the scheme charged. It is alleged that Crane is the author of books and other kinds of literature and letters and advertising matter in which he attributes all human suffering, physical or mental, to certain mysterious influences, and that when such influences become operative the person affected thereby becomes the servant and tool of the influences, and that the very soul of the person affected becomes tainted; that said "influences are worse than any physical snakes. Their venom is poison to your career and opportunities, as well as to your physical life and to your very soul;" that when the influences make their attacks nothing can save the victim except the "Christ power"; that purity, prayer, and fasting or high resolves are useless, and for the victim to reject the help held out by Arthur Crane to save the victim from the dangers resulting from the influences would equal a refusal to wear a pair of strong boots if one were walking in jungle grass full of deadly snakes. It is alleged that Crane represented that he possessed supernatural powers, with the power to save the victims from the influences. The literature is alleged to set forth that Crane could be called upon by night or day by any one desiring treatment and that the method of treatment was as follows: The party being treated by Crane should relax, breathe deeply, and with every outgoing breath say that he is unloading all his care upon Arthur Crane; that the party receiving treatment is to take the position that he is breathing out all of his own opinions, desires, and all of his knowledge and possessions, that he knows nothing, owns nothing, wants nothing and believes nothing; that the party receiving the treatment is not to resist any unpleasant or evil thought that comes to him, but is to let the said Crane do all of the resisting for him, and that he is to consciously know that he is calling Crane and breathing in his alleged perfect vitality and harmony. It is charged that it was represented by Crane that before relaxing the party receiving the treatment is to write to Arthur Crane and tell him the time which he desires for his treatment; that when treatment is given the party receiving it must accept such treatment freely and with the idea of being benefited without rendering any return to Crane; that Crane represented that he transmits the "Christ power," and administered for good and not for profit from the sale of his books. All the pretensions and representations are negatived.

Letters written by Crane are set forth in the indictment as having been mailed through the post-office establishment with the purpose of carrying out the scheme. In one of the letters Crane wrote to a man in Kansas City, Mo., that he has answered all of the "problems" in the new $2 edition of The Great Exorcism, Crane's book, and that it contains, "among other good things," "All Mysteries," "The New Philosophy," "Light on the Path," "The Song of Life," "Christ of the Cosmos," "Answers to All Your Problems," "The Life of the I Am," etc., together with instructions for healing and relaxing, and letters "from those who have been healed." The letter tells the person that the book is well worth $5, and continues: "So if you will send me $1 towards its price I will give you credit for the $1 you sent before, and mail you the $2 book complete. Because I have answered your particular problems in this edition, I feel it is absolutely vital to you to have a copy. Send the $1 in the inclosed envelope at my risk." Other letters are generally similar. Some refer to money to be sent for treatment as not Crane's money, but must be sent as a gift for his aid in casting out "influences."

J. J. Dunne, of San Francisco, Cal., for plaintiff in error.
Annette Abbott Adams, U. S. Atty., of San Francisco, Cal.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). The errors assigned may be grouped as follows: (1) Overruling objections to the indictment; (2) denial of a bill of particulars; (3) insufficiency of the evidence to justify the verdict; (4) admission of

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certain testimony; (5) certain instructions given, and refusal to give certain requests.

[1] It is said that the indictment alleges no facts showing fraud. But it clearly alleges a scheme to defraud people by means of the misrepresentations fully set forth. It also charges that the representations made were false and known to be false, and that the powers which Crane claimed to be able to exercise were not possessed by him, and that his acts and pretenses were fraudulently conceived, and were done with the purpose of defrauding.

[2] The charge was not one where defendant had a right to a bill of particulars. The indictment was plain, and fairly gave defendant information of what he must be prepared to meet on his trial.

[3] As to the sufficiency of the evidence: It is elaborately argued that there is "nothing inherently wrong in the theory of mental healing." In a general way that is conceded. The law, however, prohibits a scheme or artifice to defraud by means of false representations, and the use of the mails in executing the purposes of the scheme. One with corrupt purpose may devise a scheme to defraud by employing an alleged mental power to relieve suffering of mind or body, and may use the mails to carry out his corrupt scheme. From the voluminous record containing letters, circulars, and oral testimony, it is very clear that the court properly submitted to the jury the question whether the representations made by Crane were fraudulent and intentionally false, or were honestly made, or mere errors of judgment; and the learned judge consistently instructed that in doing the things charged, intent to defraud by false representations was essential to be proved by the prosecution. The fairness of the charge of the court is shown by the following excerpt:

"It is for you to say therefore, in this case, from all the facts and circumstances, whether defendant entered into or devised a scheme or artifice for the purpose of defrauding those with whom he might deal, as charged in the indictment, or whether he acted in good faith; he is not on trial for evolving or devising an improvident or impracticable scheme, even though you should find his plan to be such. Nor is he on trial for mere errors of judgment; neither is he on trial for evolving or devising a new religion, if it be such, with whose tenets you may not agree. The question here is not, in so far as the particular doctrines taught by the defendant are concerned, whether or not those doctrines are sound, or even plausible, but whether or not they were promulgated in good faith, and not for the purpose of fraudulently obtaining money from others. If in promulgating those doctrines, even though he received money therefor and used the mail as charged, the defendant was acting in good faith, he was not, as to them, engaged in a scheme to defraud. If you have reasonable doubt as to whether or not he was acting in good faith, you should acquit him. So that you will see, gentlemen, that under the facts developed here a very important question is as to the good or bad faith of the defendant."

The jury had before it many of the books and writings of the defendant, and without attempting to set forth the contents of these publications, it is to be specially pointed out that in the book written by the defendant called The Great Exorcism he wrote:

"I am God. I live in all bodies and am omnipresent. Thou canst not find any so-called evil place, but I am there. I, only I, am there, developing my bodies by devious ways. In every impulse I live conforming to no rule."

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He also published that the Christ power is the only influence against these evil dangers, and represented in some of his literature that he was the possessor of the wonderful power known as the "Christ power." It was also in evidence that in some of the literature Crane stated he would not charge for his treatments, but the evidence is that in several instances, when a subject or confiding person sought his advice, he would speak of the sacrifice to be made, and then would ask for such giving as the sacrifice warranted. One witness testified that he submitted to treatment for nearly 2½ months; that sometimes he would go to sleep after treatment and have horrible dreams, such for instance, as that a she-devil had set a cancer in his legs, and it commenced to eat up his legs past the ankles, and that his mother came and woke him. Witness said that he wrote to Crane that he thought the "queen of hell, one of his characters, had charge of the switch board," and that he didn't want any more treatments from him; that the book The Great Exorcism described 13 devils; that the descriptions in the book concerning the various devils upset the witness. To another witness Crane wrote as follows:

"I care not who finds fault with me for asking you—you who would be rid of influences, to send me enough money so that you will miss it. When my first inspiration came to me, and I wrote The New Philosophy, in 1904, I avoided every appearance of money-getting, by refusing to sell that book and by insisting that only those could have it who would accept it free, and feel under no obligation, and by further insisting that contributions were not wanted. Hundreds have accepted the Christ power through me, and some have risen to the height of giving up something actually valuable, in spite of being told my then rule that no contributions were wanted."

One of the clerks in the employ of Crane testified that she had answered much of the correspondence in regard to the "so-called religion," The Great Exorcism, and that from 75 to 200 letters per day were received and sent out by Crane; that on the letters she saw markings of amounts of money that had been received. He also received a conveyance of real estate valued at $7,500. Crane afterwards sold the property, and never could reconvey without apparent loss to the original donor. Defendant kept a bank account in the name of Aallwyn's Law Institute, and under that account deposited money received from his "treatments." A witness testified that she had been employed by Crane, and that the system with which the work was was carried on was that—

"* * * After the party would become kind of engrossed in the work, and it was time for a sacrifice, that is to say if they stuck it out long enough and if they had a proper disposition, they were sure to get the CC letter or the LL letter, which was the sacrifice letter."

Much more evidence might be stated, but the references made are enough to demonstrate that the case was one for the jury.

[4, 5] The jury was told that defendant must be proved guilty beyond a reasonable doubt; that a reasonable doubt is that state of the case which, after the entire comparison and examination of all the facts and circumstances, leaves the minds of the jurors in that condition that they cannot say that they feel an abiding conviction to a moral certainty of the truth of the charge. This definition was ac-

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companied by a further instruction to the effect that the prosecution was not called upon to make a case free from any possible doubt by proving defendant's guilt to an unassailable demonstration; that such proof was rarely obtainable in dealings with human transactions, and that there is hardly anything relating to human affairs that is not open to some possible or fanciful or imaginary doubt. Defendant excepted. Surely there was no error in the statement of the court. Nor do we find error in the several portions of the charge to which exceptions were taken. One of the requests for instruction was that the jury should not convict because defendant had been arrested upon the charge preferred. We see no error on the part of the court in refusing this request. The instructions laid down the presumption of innocence that the finding of the indictment was not proof of guilt, and that suspicion or probability would not justify conviction, and distinctly advised the jury as to the burden of proof, and the strength of the evidence required in order to warrant a verdict of guilty.

We have examined all assigned errors, and find that the rights of the plaintiff were in no way prejudiced.

The record shows that he had a fair trial, that the law was well stated by the instructions of the court, and that no ground is laid for disturbing the judgment against him.

Affirmed.

(259 Fed. 484)

BARKER v. EDWARDS.

(Circuit Court of Appeals, Ninth Circuit. July 7, 1919.)

No. 3261.

1. GIFTS ⟹49(1)—GIFT OF STOCKS—EVIDENCE TO SUSTAIN.

Evidence *held* to sustain a finding that a testatrix at the time of her death owned certain stock, as against the claim of a gift of the same to her son, and that it passed as part of her residuary estate.

2. CORPORATIONS ⟹619—DISSOLUTION—TITLE TO PROPERTY—OFFICERS FOR SETTLING AFFAIRS.

Under Rev. Codes Mont. §§ 3906, 6700, on dissolution of a corporation its directors become trustees, with power to settle its affairs and to sell property, but without title, which, subject to the trust, vests in the stockholders, who as to its real estate become tenants in common.

3. WILLS ⟹748—ACTION BY LEGATEE—PARTIES—SUIT BY TENANT IN COMMON.

A suit by a legatee or devisee of stock in a Montana corporation, which owned real estate, but which had been dissolved by expiration of its term of incorporation, to recover her interest from a third person who claims ownership, is not one to recover the stock for the benefit of the estate, but one brought as tenant in common of the property under Rev. Codes Mont. § 4796, and may be maintained without joining the other devisees or the executors.

Appeal from the District Court of the United States for the District of Montana; George M. Bourquin, Judge.

Suit by Florence E. Edwards against David L. S. Barker. Decree for complainant, and defendant appeals. Affirmed.

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Freeman & Thelen, of Great Falls, Mont., for appellant.

John A. Coleman, of Lewistown, Mont., and T. J. Walsh, C. B. Nolan, Wm. Scallon, and Walsh, Nolan & Scallon, all of Helena, Mont., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. Jane Barker died December 23, 1912, leaving a will under which Sarah Ford Josephine Barker and J. C. E. Barker qualified as executors. There were six heirs, David L. S. Barker, Sarah Ford Josephine Barker, J. C. E. Barker, Herbert A. Barker, Carter Barker, and Florence E. Edwards. By the will Sarah Ford Josephine Barker was bequeathed certain property in Great Falls, Mont., and $10,000, and the residue of the estate was to be converted into money and divided equally among the remaining five sons and daughters, share and share alike.

This suit is brought to establish that Jane Barker, the deceased, was the owner of 427,670 shares of stock in the Big Seven Mining Company, and that under her will Florence E. Edwards, appellee, and other heirs have become the owners thereof. It appears that E. J. Barker, a son of Jane, died in 1899, and Marcella, his widow and administratrix, claimed that the estate of E. J. owned the shares now involved, although they stood in the name of Jane, his mother. Certain litigation between Marcella and David, who had been administrator, resulted in an order of the state court that the shares should be delivered to Marcella as administratrix. There was no adjudication that the estate of E. J. was the owner of the stock, and no order compelling transfer upon the books of the Mining Company was made.

The contention of the plaintiff herein is that about 1903 David L. S. Barker, appellant herein, in order to protect his mother in her ownership of the stock, made an agreement with Jane Barker his mother, that he would advance the money to buy any claim of right, title, and interest in the shares of stock held by the estate of E. J. Barker, and would hold them in trust for her until such time as she would repay moneys advanced for the purchase; that afterward David L. S. Barker caused the stock to be bought through Sarah Ford Josephine Barker, his sister, and that he holds the stock in trust under the agreement for the estate of his mother; that he refuses to turn it over or to account and asserts ownership in himself. The defendants deny that the heirs of Jane Barker have any interest in the stock, and put in issue the allegations of the complaint with respect thereto, and also challenge the jurisdiction of the court. The District Court held that David Barker was not the owner of the stock, that when the time of the existence of the Big Seven Mining Company expired, Jane Barker was the owner of the shares, and that the rights to them passed by her will. David L. S. Barker appealed.

The Big Seven Mining Company was incorporated in December, 1892, with a term of existence for 20 years from December 20, 1892. E. J. and David L. S. Barker were two of the incorporators, and E. J. Barker acquired in his own name 435,500 shares.

The evidence as to how Mrs. Barker originally acquired the shares

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issued to her is certain testimony given by her and by David L. S. Barker in connection with certain probate proceedings in the district court of the state of Montana, in the matter of the estate of her son, Edward J. Barker, and also certain statements made by David Barker in the present case. In these probate proceedings referred to, the substance of the statements of Jane Barker was that her son, E. J., in his lifetime, had given her the stock; and David Barker also testified therein that the stock belonged to his mother, and not to E. J., his deceased brother. The stock stood in Jane Barker's name, and, although she had signed the blank indorsements on the certificates, the shares were never transferred. She gave E. J., her son, a power of attorney, but in 1895 by letter to his mother he acknowledged her ownership. The certificates had been issued to her at various times in 1894, 1895, and 1896. We are of opinion that Jane was properly held to be the owner of the shares.

It is of importance also to note that the order of court requiring David, administrator of the estate of E. J. to deliver the shares of stock to Marcella was made in the probate proceedings, and not in an independent action to test the right of ownership of the certificates. David Barker was dissatisfied, and as administrator appealed to the Supreme Court of the state, and it was there held (In re Barker's Estate, 26 Mont. 279, 67 Pac. 941), that if the shares belonged to the estate or came into the hands of David Barker as administrator, the order of the probate court was proper, but that if the property did not belong to the estate, and David did not hold it as administrator, the probate court had no power to compel him to part with it; that upon settlement of accounts the court had no power to adjudicate and finally determine questions of title between the estate and third persons, as that could only be done by action in which the parties could have a trial in the ordinary way.

Jane Barker was not a party to the proceeding in the state court; it was a matter between Marcella Barker, widow of E. J. Barker as party in interest in the estate and as administratrix, and David L. S. Barker alone.

In 1903 the administratrix of the estate of E. J. Barker obtained an order of court for the sale of the estate of E. J. Barker, and pursuant to an understanding between the administratrix and Violet Barker, acting for David, Violet Barker bid for all the estate. Sale of the assets was made and confirmed, and the certificates of stock of the Big Seven Mining Company, which had been put in escrow in a bank, were delivered by the bank to Violet Barker for David. In the returns of sales made by the administratrix and in the order of confirmation the stocks sold are described as 435,500 shares of the capital stock of the Big Seven Mining Company owned by the estate of E. J. Barker, "also, all the right, title and interest of the said estate in and to 427,670 shares of the capital stock of the Big Seven Mining Company standing on the records of said company in the name of Jane Barker," and also certain other property not material to this controversy. Thirteen thousand dollars were paid for all the assets of the estate of which $9,000 was paid on account of the stocks, including shares of corporations other than the Big Seven Mining Company.

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[1] David Barker's contention is that in 1906 his mother gave him the 427,670 shares standing in her name by handing over the certificates with the statement that they were his. His sister, Sarah, testified that she saw her mother give her brother an envelope in which were certificates of Big Seven Stock; but on cross-examination the testimony of the sister was to the effect that she did not see the certificates, but that her mother said that the envelope which was handed over contained stock. David testified that after the purchase at the administrator's sale, his mother thought she owned the stock, and that the certificates, when given to him by his mother, were in a package or envelope to which was attached a slip of paper on which were written the words, "This stock belongs to David L. S. Barker Jane Barker October 26, 1906." This slip is an exhibit sent up, but the envelope to which it is now attached is not the original, appellant saying that the original to which the slip was attached was worn out and thrown away. But in 1908 David wrote to his mother, who was then in San Antonio, and referred to the Big Seven stock that had been turned over to him by her "for protection against the balance of the Barkers until I get my money out of it." Furthermore, David sent to his mother a list of what she had in Neihart, and included therein "426,000 shares of Big 7 stock with $13,000.00 and interest against the same." The evidence tends to show that the letter to the mother and the list sent were written at the same time, and that both papers were obtained by the plaintiff, Florence Edwards, from Carter Barker in Texas about 1914. The written statement of David that there were $13,000 against the stock is probably not true, because David had paid only $13,000 for all the assets of the estate of his brother, E. J. Barker, and only $9,000 were paid on account of the mining stocks, which included more than 10,000 shares of stock of another company. David, in support of his plea of a gift, introduced a letter written to him by his mother, dated January 7th, at San Antonio. The letter itself gives no year, but the contention of David is that it was written in 1909. In it his mother says:

"Now about this mining stock. I will never need it. But I beg of you to give Herby & Family some help. * * * About the stock J. C. wanted me to sign some paper but I knew better as it would only cause trouble & I guess I know who helped me in many things. Wont sign as I told him I owned no stock. But I beg of you do your best give no trouble; it was about our house because Carter arranged after I pass out my children get each a share inside of year not wait to they die. * * *"

When all the evidence is considered, the statement by the mother that she would never need the stock does not impel the inference that she intended to make a gift and not to permit the stock to be held as a security. If she had intended to relinquish all her right to the stock, she would not have said that after her death her children would each receive a share of her estate inside of a year, and not wait until they died. This is a reasonable view when we remember that, except for the shares here involved, there appears not to have been enough property in the estate even to pay in full the legacy of $10,000 left to the daughter, Violet. And furthermore, it is in evidence that Jane Barker claimed ownership of the stock up to the time of her

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death, for Mrs. Edwards, to whose evidence the court below gave credit, says that her mother, just a few days before she died, said that she owned the stock, that she had provided for one daughter in her will, and that the stock and whatever else she had was to be divided among the other heirs.

We think it is unnecessary to refer at greater length to the testimony upon the question of the ownership of the stock. Whether Jane Barker gave the stock to David was purely a question of fact, dependent for decision upon the credibility of the witnesses; and, there being ample substantial evidence in support of the conclusion reached, we will not disturb the decision made.

[2] Appellant contends that there was a lack of jurisdiction. Florence Edwards sued as a citizen of California, while defendants are citizens of Montana. It is said that this is an action to determine title to stock and to have title to stock decreed in trust for the estate of Jane Barker, deceased, and that, therefore, all the heirs and legatees of the estate are necessarily interested parties, and in no way antagonistic to the claim of plaintiff, except David L. S. Barker, and that all the heirs and the executor and executrix are indispensable parties.

The property to which Florence E. Edwards alleges a right is that which belonged to a mining corporation, dissolved by operation of law; dissolution having occurred before the death of Jane Barker. The property itself is real estate. The certificate of shares may be the evidence of the ownership and the right to the possession of the certificates may be a subject of litigation, yet we believe that a stockholder may assert her right without having to allege anything about the certificates of stock. As the legatee of Jane Barker, plaintiff, became invested with a title, legal or equitable, as it may be, in and to an undivided share of the property of the dissolved corporation, and we think she could assert her right in her own name as distinct from any right in the executor of the estate. By sections 3906 and 6700 of the Revised Codes of Montana, directors of a corporation, at the time of its dissolution, become trustees of the creditors and stockholders or members of the corporation dissolved, and have full power to settle the affairs of the corporation, and as such trustees are authorized to execute all grants of real estate owned by such corporation. When a corporation is dissolved the District Court on application of any creditor of the corporation, or any stockholder, may appoint one or more persons to be trustees to take charge of the estate and effects thereof, and to collect the debts and property due and belonging to the corporation, and to pay the outstanding debts thereof and to divide the moneys and other property that shall remain over among the stockholders or members. The sections referred to are very similar, respectively, to section 565 of the California Code of Civil Procedure and section 400 of the Civil Code of California.

In Havemeyer v. Superior Court, 84 Cal. 327, 24 Pac. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192, it was held that upon the dissolution of a trading corporation its property belongs, after payment of its debts, to those who were stockholders at the time of the dissolution. And in Rossi v. Caire, 174 Cal. 74, 161 Pac. 1161, the court held that where a corporation ceases to exist it is no longer capable of

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holding the title or possession of property, but that it belongs to the persons who were its stockholders at the time it ceased to be a corporation, and the right of possession passes to the directors by force of the statute making them trustees to settle the corporate affairs, since such right must be necessary for that purpose.

[3] It would seem that in Montana stockholders of a dissolved corporation become vested with a full title, legal as well as equitable, and that the liquidating trustees of a dissolved corporation have the right of possession, with full power of sale, but without title. But, however that may be, as against third persons our opinion is that stockholders of such a corporation stand as in a relationship of tenants in common, and may assert a legal as well as an equitable title. Payne v. Hook, 74 U. S. (7 Wall.) 425, 19 L. Ed. 260; Byers v. McAuley, 149 U. S. 609, 13 Sup. Ct. 906, 37 L. Ed. 867; Union Mill & Mining Co. v. Dangberg (C. C.) 81 Fed. 73. Section 4545 of the Revised Codes of Montana provides that the grantee or devisee of real property subject to a trust acquires a legal estate in the property as against all persons except the trustees and those lawfully claiming under them. Again, section 4796 of the Revised Codes of Montana provides that a devise or legacy given to more than one person vests in them as owners in common, and it is well established by the authorities cited above that one owner or tenant in common may maintain an action for the protection of his rights in the property without joining his co-owners, and that the right of an heir or legatee to maintain an action in his own right will lie. Jellenik v. Huron, 177 U. S. 1, 20 Sup. Ct. 559, 44 L. Ed. 647. See, also, Waterman v. Canal Louisiana Bank, 215 U. S. 33, 30 Sup. Ct. 10, 54 L. Ed. 80.

In the decree made by the court, the relief does not affect the rights of the executors or of any person except the defendant, David L. S. Barker. Whatever rights the executors may have, or the third parties who have liens may have, are preserved. This restricted relief granted protection of the individual rights of Florence Edwards and dispenses with the necessity for making the executors parties to the litigation, and, nothing having been determined which affects the rights of the executors, they are not indispensable parties, and J. C. E. Barker is not to be aligned as a party plaintiff herein. Nor do we believe the other heirs are indispensable or necessary parties. The decision in favor of Mrs. Edwards is not conclusive against them. If they are represented by executors so as to be bound by an adverse decree, they are not necessary parties, while if they are not so represented, obviously they cannot be bound by a decree to which they are not parties.

It is quite evident from the record that J. C. E. Barker as executor was not willing to bring and carry on a suit to recover the shares due to Florence Edwards, and that David and his sister, Sarah Ford, are opposed to any recovery by Florence because in their answer they have denied her right, and denied that Jane Barker owned the stock.

Believing that a just and proper decision was made, the decree is affirmed, with costs in favor of appellee.

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(259 Fed. 490)

CHICAGO, D. & G. B. TRANSIT CO. v. MOORE et al.

(Circuit Court of Appeals, Sixth Circuit. June 30, 1919.)

No. 3258.

1. EVIDENCE ⟹596(1)—CIVIL ACTION—PREPONDERANCE OF EVIDENCE.
In a civil action, proof need not be beyond all possible doubt, but a preponderance of the evidence, or a showing of a greater probability, is all that is required.

2. ADMIRALTY ⟹118—REVIEW—FINDING.
A decree of the District Court in admiralty, the testimony being taken in open court, should be accepted on an appeal, unless the evidence clearly preponderates against it.

3. SHIPPING ⟹166(4)—CARRIAGE OF PASSENGERS—IMPURE DRINKING WATER—EVIDENCE—SUFFICIENCY.
On libel by a number of passengers on respondents' vessel, evidence *held* sufficient to sustain a finding that they were supplied with water infected with typhoid fever germs.

4. SHIPPING ⟹166(4)—CARRIAGE OF PASSENGERS—IMPURE WATER—EVIDENCE—SUFFICIENCY.
On libels by passengers on a steamship, evidence *held* to warrant a finding that they contracted typhoid fever from drinking polluted water which was furnished by the vessel.

5. SHIPPING ⟹166(4)—CARRIAGE OF PASSENGERS—IMPURE WATER—EVIDENCE—SUFFICIENCY.
Evidence *held* to warrant a finding that one passenger on respondents' vessel contracted arthritis, resulting from an intestinal infection from drinking impure water furnished on the vessel.

6. SHIPPING ⟹166(4)—CARRIAGE OF PASSENGERS—IMPURE WATER—EVIDENCE—SUFFICIENCY.
Evidence *held* to warrant a finding that one passenger on respondents' vessel contracted typhoid fever resulting from impure drinking water furnished by the vessel, and that gallstones resulted therefrom.

7. SHIPPING ⟹166(4)—CARRIAGE OF PASSENGERS—IMPURE WATER—EVIDENCE—SUFFICIENCY.
Evidence *held* insufficient to warrant a finding that a passenger on a vessel, who became ill, suffered from typhoid or paratyphoid fever contracted from drinking impure water furnished by the vessel.

8. SHIPPING ⟹166(4)—CARRIAGE OF PASSENGERS—IMPURE WATER—EVIDENCE—SUFFICIENCY.
A finding that a passenger on a vessel, as the result of drinking impure water furnished, contracted typhoid fever, which caused a rectal abscess, *held* warranted.

9. ADMIRALTY ⟹118—REVIEW—CIRCUIT COURT OF APPEALS—ADMIRALTY CAUSES.
The hearing of an admiralty appeal in the Circuit Court of Appeals is, in view of the history of such appeals, and prior to the creation of the Circuit Court of Appeals, treated as a hearing de novo.

10. DAMAGES ⟹131(1)—PERSONAL INJURIES—MEASURE.
An award of $1,500 for pain and suffering in favor of passengers on a steamer, who contracted typhoid fever as a result of drinking impure water furnished, *held* not excessive.

11. DAMAGES ⟹132(1)—PERSONAL INJURY—MEASURE.
An award of $2,000 for past and future suffering, as well as $1,500 for medical expense, in favor of a passenger on a steamer who contracted typhoid fever, which resulted in gallstones necessitating an operation, *held* not excessive, where the wound made by the operation never healed, and a drainage tube had to be inserted, etc.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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12. DAMAGES ⟹133—PERSONAL INJURIES—BUSINESS LOSSES.
An award of $7,500 for loss of time from business in favor of a passenger on a steamer who contracted typhoid fever resulting in gallstones, as the result of drinking impure water furnished, *held* not warranted, and it should be reduced to $1,000.

13. DAMAGES ⟹133—PERSONAL INJURIES—BUSINESS LOSSES.
An award of $7,000 for loss of time from business in favor of a passenger who contracted arthritis as a result of an intestinal infection caused by drinking impure water furnished on respondents' vessel, *held* not an excessive award for the passenger's loss of time.

14. DAMAGES ⟹130(1)—PERSONAL INJURIES—MEASURE.
Where a passenger on a vessel who owned and conducted a grocery business contracted typhoid fever as a result of the impure drinking water furnished, causing loss of time, etc., *held* that an award of $7,500 for pain, suffering, and expense and loss of time was excessive by $2,500.

15. DAMAGES ⟹46—PERSONAL INJURIES—ITEMS.
Where two sisters, passengers on a steamer, contracted typhoid fever as a result of drinking impure water furnished, *held* that they could recover for medical expenses, and the expense of nurses, though such sums were paid by their parents.

16. HUSBAND AND WIFE ⟹209(4)—PERSONAL INJURIES—ITEMS.
Where a passenger on a steamer contracted typhoid fever as a result of impure drinking water furnished, *held* that he might recover for the value of his wife's services in nursing him.

17. DAMAGES ⟹130(1)—PERSONAL INJURIES—MEASURE.
On a libel by a passenger on a steamer who contracted typhoid as a result of impure drinking water furnished, *held* that an allowance of $216 for medical services and drugs, plus $80 for four weeks' services of the passenger's wife in nursing him, together with an award of $250 for two months' loss of business, as well as an award of $2,000 for pain and suffering, was not excessive.

18. ADMIRALTY ⟹118—REVIEW—INTEREST—AWARD.
On a libel by passengers of a vessel who contracted typhoid fever from drinking water furnished, where the interlocutory decree and order of reference was dated June 28, 1917, and the master's report was dated May 25, 1918, *held* that, where it did not appear that delay resulted from the wrongful act of respondent owner of the vessel, or that the discretion of the trial court had been abused, an award of interest from the date of report only will not be disturbed.

Appeal from the District Court of the United States for the Southern Division of the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Libels by Charles T. Moore and others against the Chicago, Duluth & Georgian Bay Transit Company, sole owner of the steamship South American. From decrees for libelants, respondent appeals. Affirmed as to all libelants save three.

Chas. E. Kremer, of Chicago, Ill., for appellant.

Geo. E. Brand and Arthur Kilpatrick, both of Detroit, Mich., for appellees.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. Appellees, 11 in number, filed libels in rem for recovery of damages by reason of illnesses alleged to have

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been caused by tainted food and contaminated water asserted to have been served to libelants while passengers on the steamer South American on an excursion in July, 1915, from Detroit to Houghton, Mich., except that in Campbell's libel injuries to his daughter Elizabeth were alone involved, and that Ballard's was filed solely on account of injuries to his daughter Dorothy. Each of the 11 passengers in question was ill on the boat, and each on returning home developed a serious illness. The District Judge found that a comparatively small quantity of tainted duck and meat was negligently served to the passengers, and that contaminated water was also negligently provided for them; but, while expressing a suspicion that some of the illnesses on the boat may have been aggravated by eating the tainted food or drinking the contaminated water, was of opinion that libelants had not sustained the burden of proving that such illnesses were caused thereby, and accordingly denied recovery for illnesses on shipboard. It was, however, found as a fact that each of the libelants received from the contaminated water the disease germs which caused their illnesses after the return of the boat to Detroit; the illness of nine of the libelants being found to have been typhoid fever, and in the case of each of the other two an illness closely allied to typhoid. There was interlocutory decree, with reference to a master commissioner to take testimony and report the nature of the respective illnesses and the respective damages there from; the steamer being declared liable for all illnesses "which might reasonably be traceable to impure drinking water partaken of on the trip." In Moore's case the steamer was expressly declared liable for the typhoid fever as also for a gallstone trouble, provided that trouble was found to be due to drinking the impure water. The commissioner found and reported that Moore's gallstones were so caused, and that the illness of each of the other libelants might reasonably have been caused by the furnishing of the impure drinking water on the trip; the illness of seven of the libelants being found to have been typhoid fever, those of Lawrence and Hudson "typhoid or paratyphoid," that of Town an "intestinal affection," and that of Mallotte arthritis. There was an award of damages to each libelant. The claimant and five of the libelants excepted to the report, and each party moved for a reopening of proofs. All exceptions and both motions were overruled, and final decree entered in accordance with the master's report.

1. We have no difficulty in affirming the conclusion that contaminated water was, during several hours at least, and through the steamer's negligence, provided for the passengers on the South American.

The boat was provided with a sterilizer and a filter, and normally only sterilized and filtered water was served to passengers. However, between 10:30 and 11 p. m. on Sunday, June 6th, the boat ran aground in Hay Lake (which is a broadening out of St. Mary's river), about 12 miles below the Soo; her sea cocks, from which water is supplied to the boat, being imbedded in the mud. She was not released until between 4 and 5 a. m. of the following day, which was Monday, June 7th. Meanwhile the water in both ballast and fresh-water tanks had been exhausted for power purposes. When the boat was released water was pumped directly from the river into the fresh-water system,

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without being sterilized or even filtered, and without any attempt to get rid of the mud in the sea cocks except by blowing out with steam. This fresh-water system supplied all the faucets in the staterooms as well as the drinking fountains in the saloon. The ship's officers recognized the river water taken on as unfit to drink and did not themselves drink it. The crew were not allowed to drink it, and the faucet ordinarily available to them was wired up. The steward would not serve it on the table, and so no water was served at either breakfast or luncheon on the seventh. But neither the faucets in the staterooms nor the fountains in the saloon were sealed, nor was any notice given to passengers that the water obtainable therefrom was not wholesome. In this the steamer was clearly negligent; for, as the District Judge well said, it could not be assumed that passengers would refuse to drink the water merely because it was roily. That it was drunk by many of the passengers is well established. Indeed, the nonservice at table and the lack of ice water would naturally tend to increase the consumption of the available water.

The record indicates that the water of the St. Mary's river at the point from which the water in question was taken was unfit for human consumption. The published report of the International Boundary Commission, investigating the pollution of boundary waters, found in 1913 that the water of that river was polluted by sewage not only from boats, but (below the American and Canadian Soos) by the passage directly into the river of the sewage not only of both those towns, but of Steelton, practically a suburb of the Canadian Soo. In the neighborhood where the water in question was taken the colon bacillus was found in as small a quantity as one-tenth of a cubic centimeter of water. This conclusively proved the water dangerous to drink, not because the colon bacillus causes fevers such as typhoid, for it does not, but because it is an intestinal germ, and its presence, to the extent stated, shows the presence of excreta from feces and urine; and because the bacillus typhosus, or typhoid germ, which is said not to be capable of direct isolation in water (although there is seemingly evidence to the contrary), and which expelled in the feces and urine of a patient (and thus where it exists accompanies the colon bacillus) furnishes, in the form of drinking water, the most potent source of typhoid infection, in the general acceptance of the medical profession.

[1-3] The commission's report referred to states that "acute outbreaks of typhoid [at the Canadian Soo] must always be expected" from the use there of the polluted water. It also refers to the "continued excessive typhoid rate" of the American Soo, especially during the "navigation season"; although it would appear from the appendix that conditions at the American Soo have been so much improved that there is practically no typhoid during the winter. The report of the Michigan State Board of Health shows what appears to be an excessively high death rate at the American Soo from 1900 to 1913. These public reports should have been known to the steamer's management. In 1915 eight cases of typhoid at the American Soo were reported, one on June 4th. As opposed to these considerations are the facts that the water in question is not shown by actual analysis to have contained the typhoid germ, that other methods of infection (as by

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flies, milk, and otherwise) are possible, and that the possibility of infection by other means than the water in question is not conclusively negatived. It must be conceded that the existence of the typhoid germ in the water taken from the river, and served on board the ship, is not proven beyond all possible doubt. But such degree of proof is not necessary. A preponderance of the evidence, a showing of greater probability, is all that is required (Marbury v. Railroad Co. [C. C. A. 6] 176 Fed. 9, 99 C. C. A. 483); and in our opinion the evidence preponderates in favor of the final conclusion of the court below, which, indeed, we should accept, unless at least the evidence clearly preponderates against it. Monongahela Co. v. Schinnerer (C. C. A. 6) 196 Fed. 375, 379, 117 C. C. A. 193; Cleveland v. Chisholm (C. C. A. 6) 90 Fed. 431, 434, 33 C. C. A. 157.[1] Indeed, there are several features which, taken together, persuasively point to that conclusion, including (a) the fact that so large a number of typhoid cases was shown to have developed on the South American; and (b) that, so far as appears, there were no typhoid cases among the passengers on the North American (a sister ship of the South American), which passed over the course at approximately the same time, but which did not take water from the Soo river—a consideration which we think not nullified by the fact that the North American's passengers were largely from Western Michigan ports, while libelants in large part took the steamer at Detroit, where typhoid is generally more or less endemic, as is usually the case in large cities.

We think the otherwise reasonable probability that the water in question contained typhoid germs in dangerous quantities is not overcome by the facts that the American Soo has had no epidemic of typhoid in recent years, and that the typhoid case of June 4, 1915, is not shown to have caused the infection here in question. A conclusion based on such facts would overlook not only the continuing deposit of sewage from the Canadian Soo, the danger from lake boats during the navigation season, the fact that a considerable number of typhoid patients remain "typhoid carriers" (and thus not improbably there were several at the American Soo, which continued to discharge its sewage into the river) for a long period of time after apparent recovery from the disease (and so no longer reported as having it), meanwhile expelling the typhoid germs through the excreta; it being assumed by competent authorities that at least 50 per cent. of all cases of typhoid infection are due to typhoid carriers. There seems no good reason for expecting the 1915 sewage deposit at the place in question to differ materially in amount from that found in 1913, or for believing that its dangerous character had been eliminated.

[4] 2. Passing for the present the case of Mallotte, who had arthritis, and the cases of Moore, Hudson, and Kay, whose fevers were complicated with other conditions, we have no difficulty in affirming the conclusion of the District Court that the serious illness of each of the other seven libelants after leaving the boat was due to contaminated

[1] So far as seems material to the case as presented here, the testimony previous to the accounting was taken in open court, that before the master commissioner being likewise so taken.

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water drunk on the boat; and that in the case of all of these seven, unless it may be Town, whose disease was found by the District Court to be an intestinal affection, each suffered from typhoid fever or a fever of a similar nature. In the case of nearly all of the eleven libelants there is express testimony that they drank the water in question; in the case of none of them does the evidence exclude such probability. Each of the seven libelants referred to was attended throughout his illness by a reputable local physician, and in each case (still qualifying as to Town) the disease was pronounced unquestionably typhoid, or of that nature, and treatment given accordingly. We must reject the respondent's contention that the testimony of these physicians is unreliable because based only upon clinical symptoms. Until a comparatively recent period all diagnosis of typhoid fever has rested entirely upon clinical symptoms. Probably no continuous fever is better known to the medical profession generally. As is well known, it is essentially a disease of the intestine, usually marked by certain characteristic symptoms more or less clearly defined, including red spots on the abdomen, a long continued fever (with what is called a "step-ladder" temperature), which increases generally from day to day during the first two weeks or so, until the climax is reached (the forenoon temperature being lower than the afternoon), after which the temperature usually decreases from day to day for another two weeks or so. It is accompanied by derangement of the bowels, including ulceration of the intestine. In recent years the medical profession has, to a greater or less extent, made use of three laboratory tests, tending toward a more nearly absolute diagnosis. These are (a) a count of the white blood cells, (b) the Widal or agglutination test, and (c) the blood-culture test. These tests are confirmatory, and are especially valuable where the clinical typhoid symptoms are not strongly and characteristically marked. The Widal test is the one more commonly used; and the more prominent criticism is that in the cases before us it either was not employed, or, if employed, usually did not make a positive showing. But it is generally conceded that a negative response to the Widal test is not inconsistent with the existence of typhoid. The most we would be justified in concluding from this record is that, in the absence of confirmation by such laboratory tests, a clinical diagnosis of typhoid fever is not absolutely conclusive. But the rules of evidence in cases of this nature do not require absolute scientific certainty; and we think the testimony of the attending physicians establishes, by a fair preponderance of the evidence, the existence of typhoid or similar fevers. The record does not convince us that able and successful physicians, familiar with typhoid fever, are very likely to mistakenly diagnose and successfully treat other diseases as typhoid or paratyphoid. It is true that, in the case of each of several of the libelants, expert medical witnesses of high standing have expressed the opinion that, upon the hypotheses contained in the question submitted to them, the patient was not suffering from typhoid fever, but this, at most, raised only a question of fact; and in several of the cases the accepted hypotheses either did not accord with the weight of the evidence or contained elements either disputed or nonexisting.

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We cannot accept respondent's contention that the fevers clearly developed either too soon or too late to connect them with the water-drinking on board the ship. The length of the period of incubation, or the time elapsing between the entrance of the germ into the alimentary canal and the first symptoms of the disease, is variously given by medical witnesses. Some place it as low as 6 to 10 days, one as from 7 to 21 days. One witness for respondent says that if the patient takes a very diluted solution the incubation period may be as long as 30 days. There is other testimony all the way between these extremes, although perhaps the consensus would make the more usual average somewhere around 10 to 14 days. The first, or prodromal, symptoms, which consist generally of a "below-par" or "run-down" feeling, frequently accompanied by headache, backache, and more or less fever, continue usually several days, sometimes 10 days or more, before the patient feels ill enough to go to bed. Sometimes a patient is up and about even longer. In the case of Elizabeth Campbell (for some reason not reported as typhoid) a physician seems to have been called about June 23d or 24th. In her case there was a positive Widal test before June 28th. A physician was called for Dorothy Ballard on June 27th. She then had a temperature of over 103. Her case was pronounced a typical case of typhoid fever. Lawrence, about June 28th, consulted the same physician who treated Elizabeth Campbell. He then had no fever. On June 30th he had a fever of about 100. On July 2d the Widal test was negative. The doctor diagnosed his case as either typhoid or paratyphoid, and gave him an antityphoid treatment, using a typhoid vaccine, whose results were very marked. Robinson called a physician on July 3d. He then had a temperature of 102, and had apparently been ill for 10 to 14 days. His clinical symptoms were typically typhoid, although the two Widal tests were negative. Town consulted a physician on June 14th. He was then suffering from infection of the bowels, and was confined to bed from July 9th to August 4th, after which he suffered a relapse, and was again confined to bed from August 17th to August 31st, thereafter receiving office treatment until September 18th, during all of which period he carried a fever of from one to four degrees. His attending physician regarded his illness as following an attack of ptomaine poisoning. There seem to have been typhoid symptoms, although not as typical as in the case of the Woodfields, soon to be mentioned. As the court and master both characterized Town's ailment as an "intestinal affection," and as the attending physician so called it, it is unnecessary to go farther. In the opinion of his attending physician the typhoid or paratyphoid condition overlapped the original intestinal affection. That such complaint could well have been caused by drinking contaminated water or eating diseased food is well within the testimony.

The cases of Madeline and Marion Woodfield were the latest to develop. A physician (the same who attended Town) was called July 17th. Each patient then had a high fever and had apparently been ill two weeks. The cases were reported as typhoid on July 21st, the treatment continued until August 17th, and the cases were regarded and

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treated by the attending physician as typically typhoid. We see no occasion to question the conclusion of the District Court that these cases also resulted from the drinking of contaminated water on the South American.

[5] 3. *The Case of Mallotte.* It is not claimed that Mallotte had typhoid fever. The claim is that he had arthritis, resulting from an intestinal infection from drinking the impure water following a probable disturbance caused by bad food.

There was evidence tending to show that he drank the polluted river water and that he ate some of the tainted food. While on the boat he was attacked with dysentery, accompanied by headache and other pains. He was so ill that he was taken by train from Houghton to Detroit, where he lived. On June 11th he consulted his family physician, who testifies that he then had evidences of internal infection. He continued to take office treatment until June 23d or 24th, when he was put to bed, and on July 5th was taken to Grace Hospital, where he remained until July 26th. He had a severe and painful illness, accompanied by inflammation of the joints, together with endocarditis and pericarditis, which latter affections did not entirely leave until about March, 1916. His attending physician diagnosed the case as arthritis, resulting from an intestinal affection due to something taken into the alimentary canal through the mouth; the physician testifying that in his opinion this infection could have been caused by drinking the impure water. There is testimony sustaining an inference that the bacillus coli introduced into the system in sufficient quantities might cause an infection capable of invading the joints.

It is respondent's theory here, as indicated by quotation from the testimony of one of its medical experts, that Mallotte doubtless had arthritis or articular rheumatism, and that this condition was actually due to an intestinal infection resulting from the boat trip; but that it was not due to drinking polluted water (or, inferably, to anything taken at the time into the system through the mouth), but to a "faulty elimination," or so-called autointoxication, resulting from change of climate, environment, and temperature, which dammed up the poisons in his system (more particularly, according to the testimony of one of respondent's medical experts, in the tonsils, throat, teeth, and sinuses of the head), causing dysentery, headache, backache, and finally arthritis. That the infection which caused the arthritis or articular rheumatism was also responsible for the heart affections is not challenged. The record thus presents merely a case of conflicting medical theory, as to just how the intestinal infection was caused. If the judgment of the attending physician is accepted, the conclusion of the master and judge should be sustained. As opposed to this, there is testimony that germs taken by the patient, while on the boat, directly into the alimentary canal through the mouth, could not have caused Mallotte's arthritis. This may be entirely true; but the testimony to this effect is by no means convincing. On the other hand, there is, besides the testimony of the attending physician already alluded to, the undisputed and undiscredited testimony of libelant, who was but 43 years old when he took the boat trip in question, that he had never before

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had rheumatism nor any disease of the joints, nor grippe, nor colds, nor trouble of the tonsils, nor attacks of diarrhea, nor any disease that he knew of except typhoid fever 24 or 25 years before; that for 20 years before the hearing he had had his teeth looked after three or four times a year; that he was never seasick, and that on the boat he was warmly and comfortably dressed. This condition of health, while not conclusive against respondent's theory of autointoxication, naturally tended against it. Consideration of the testimony convinces us that we would not be justified in holding that the master and judge should have followed respondent's theory and testimony rather than that of libelant, or that the evidence decidedly preponderates against the conclusion below that Mallotte's arthritis "might reasonably have been caused by the furnishing to said libelant of impure drinking water on said trip."

[6] 4. *The Case of Moore.* The illness of this libelant was complicated with an attack of gallstones. Respondent's special contention is that Moore did not have typhoid fever, that his illness was due entirely to gallstones, and that the latter were not caused by drinking contaminated water. A careful review of the evidence convinces us that we would not be justified in questioning the conclusion of the court below that Moore suffered from typhoid fever as the result of drinking the contaminated water on the ship, and that the gallstones were the direct and immediate result of the typhoid. There is express evidence that Moore drank the river water on the South American. After his return from the trip, and about June 27th, he consulted a physician, who prescribed for him on that day and on the day following. The physician was called to the house about July 4th, when Moore had taken to bed. His temperature about the 1st of July was 102 degrees. He was in bed four or five weeks. About 12 to 15 days after the fever began a consulting physician was called, who made a blood count, and pronounced the case "undoubtedly typhoid fever." The consulting physician did not appear as a witness, but the attending physician testified that "I didn't consider it necessary to have a Widal test made because I was so positive of my diagnosis without it. * * * There was no question about its being typhoid." It was so reported. The consulting physician found the gall bladder distended to several times its natural size, but advised against immediate operation on account of its danger in Moore's then condition. The distension was reduced by ice-packs. Moore's convalescence was slow, and after spending two or three months in attempts at recuperation he was stricken with an acute condition of the gall bladder, resulting in an operation on November 22d and the removal of a large number of gallstones. It appears that Moore had had two or perhaps three attacks of ptomaine poisoning before his trip on the South American, and that a month or so before that trip his physician, who was treating him for what is colloquially called "biliousness," suspected the possibility of gallstones, and accordingly had an X-ray taken, which disclosed no gallstones. The attending physician testified that "if they are genuine gallstones they would be detected by the X-ray." The medical testimony is to the effect that gallstones are caused by clogging of the duct

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reaching from the gall bladder to the intestine, and that such clogging, and the consequent formation of calculi, may be caused by ptomaine poisoning or any one of several causes of infection, and that a patient may have gallstones for a long period of time without their presence being discovered. A medical witness for respondent testified that "the typhoid fever cannot produce the gallstones"; but there is abundant evidence to the contrary. Indeed, the head of the Department of Medicine at Providence Hospital, Detroit, who, after examining Moore, advised the operation, testified that "one of the very common causes of gall bladder diseases and associated gallstones is typhoid"; also that the time which elapsed between the latter part of June and November 22d was sufficient for the development of Moore's gallstones. It was evidently his opinion that the gallstones in question were of recent formation. The surgeon who performed the operation gave it as his opinion, from the medical history, that the typhoid fever caused gallstones; saying that the latter were of "the soft pulpatious type of gallstones that I should say had been short in their formation." The evidence clearly does not preponderate against, but strongly supports, the conclusions of the master and judge.

[7] 5. *The Case of Hudson.* About June 26th this libelant called a physician, who testified that the patient told him he had been ill about a week. The physician sent him to Harper Hospital, Detroit, on July 9th, where he remained until August 10th, being attended by the physician who sent him there. The master found that Hudson suffered from typhoid or paratyphoid fever. He also found that during a part of the time when libelant was in the hospital suffering from that fever he also suffered from an internal inflammatory ailment, which the master concluded was merely a local condition, the effect of which upon the typhoid or paratyphoid was negligible.

Respondent contends that Hudson did not have either typhoid or paratyphoid fever, and that his illness was due solely to the inflammatory ailment mentioned. The attending physician testified that the disease was typhoid or paratyphoid, and that the inflammatory condition mentioned was a recurrence of a chronic affection of several years standing, for which he had treated Hudson "off and on for probably three or four months previous" to the typhoid or paratyphoid fever, and that the condition referred to was merely local. The hospital record introduced before the master showed conditions admittedly due to, and treatment obviously for, this inflammatory ailment. The record presents a sharply defined question of fact as to whether he also had typhoid or paratyphoid fever. On the one hand, the attending physician testified positively that he diagnosed it as typhoid or paratyphoid and has never varied his judgment. It was reported as typhoid on July 21, inferably at the instance of the attending physician. On the other hand, a hospital interne in charge of Hudson's case testified that the latter did not have typhoid fever and was not treated for it. A pathologist of that hospital gave his opinion, from an examination of the chart, that the patient did not have typhoid or paratyphoid and was apparently not treated therefor. This opinion was corroborated by two other expert witnesses, based upon an exam-

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ination of the chart. At the hospital three Widal tests were made at the request of the attending physician, the last being made on July 20th. All were negative. An eminent physician called by libelant's attending physician as a consultant was not produced as a witness. The condition referred to did not appear in the testimony before the district judge.

Upon a careful consideration of the entire testimony, assuming that the attending physician believed he had a case of typhoid or paratyphoid, and giving due weight to the conclusion of the master and the district judge, we are unable to escape the conviction that the evidence clearly preponderates against the conclusion that libelant has sustained the burden of showing that he suffered from typhoid or paratyphoid fever due to water infection. We are thus bound to reverse the finding below. The Ariadne, 13 Wall. 475, 479, 20 L. Ed. 542; Western Transit Co. v. Davidson S. S. Co. (C. C. A. 6) 212 Fed. 696, 701, 129 C. C. A. 232, and cases cited.

[8] 6. *The Case of Kay.* There is testimony directly tending to show that this libelant drank the river water. On July 2d he consulted a physician, who pronounced his disease absolutely typhoid. His was the only case at Corunna. The physician, after stating Kay's symptoms on July 2d, gave the opinion that he had been in a condition requiring a physician's care for a week or ten days previously. An experienced nurse, who attended him after July 12th, pronounced the case clearly typhoid. The fever, which after July 12th seems to have run as high as 103, left him the last of July, pneumonia setting in, according to the testimony of the nurse (although the physician does not so state, but says Kay had bronchitis), on July 27th. The nurse in question seems to have practically ceased her attendance on July 31st by reason of her own illness. During Kay's illness a rectal abscess formed which was operated upon about July 26th (evidently the day before the pneumonia is said to have begun), Kay having been delirious on and several days before that date. It is undisputed that such an abscess could readily occur as a sequel to typhoid fever. There is, however, a large amount of expert medical testimony, in answer to hypothetical questions, to the effect that the abscess was not caused by the typhoid fever, but was itself sufficient to account for the clinical symptoms. This testimony, however, is apparently so largely based upon misapprehension of the entire history of Kay's illness (the chart introduced dated only from July 12th) as not to justify us, in view of the testimony of the attending physician and of the nurse, in disturbing the conclusion of the master commissioner and of the District Judge that Kay suffered from typhoid fever induced by drinking the contaminated water on the ship.

[9] 7. We are asked to reverse the conclusion of the District Court that libelants have not sustained the burden of proving that their illnesses on board ship were caused by eating tainted food. Respondent denies our jurisdiction to review that subject for the reason that libelants have not appealed. Before the creation of the Circuit Courts of Appeals it was the rule that on appeal in admiralty from the District Court to the Circuit Court the case was to be tried de

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novo, without regard to whether appeal is taken by both parties or by only one. Irvine v. The Hesper, 122 U. S. 256, 266, 267, 7 Sup. Ct. 1177, 30 L. Ed. 1175. The act of February 16, 1875, 18 Stat. 315, c. 77 (Comp. St. §§ 1585, 1586), restricted review by the Supreme Court of the rulings of the Circuit Court to such as were excepted to at the time and presented by bill of exceptions, as in actions at law. There has been a conflict of decisions as to the practice of the Circuit Courts of Appeals in these respects. In Munson S. S. Line v. Miramar S. S. Co., 167 Fed. 960, 93 C. C. A. 360, on a review of the conflicting decisions, the Circuit Court of Appeals of the Second Circuit held that, on an appeal in admiralty from the District Court to the Circuit Court of Appeals, the whole case was open for trial de novo, and that the fact that one party did not appeal did not preclude the court from directing entry of decree favorable to him. In Reid v. American Ex. Co., 241 U. S. 544, 36 Sup. Ct. 712, 60 L. Ed. 1156, the Supreme Court, on review of the decision of the same Circuit Court of Appeals, in another case, held that the right to a trial de novo in the Court of Appeals still remained, under the authority of Irvine v. The Hesper, supra. The practice of the Circuit Court of Appeals for the Second Circuit as announced in Munson v. Miramar was sustained. We have treated the hearing of admiralty appeals in this court as of a de novo character. Western Transit Co. v. Davidson, supra, 212 Fed. at page 701, 129 C. C. A. 232. But we have not had occasion to determine whether a nonappealing party is entitled to a review of questions as to which he took no appeal. Whether the decision in Reid v. Express Co., supra, was intended to make the rule adopted by the Second Circuit applicable to the other circuits is not clear. But, assuming that libelants have the right to a review of the question stated, we are of opinion that the evidence does not clearly preponderate against the District Court's conclusion. We find it unnecessary to discuss the evidence in this regard, especially in view of the careful consideration given that subject by the District Judge.

[10] 8. *The Damages.* Except in the case of Dorothy Ballard and Elizabeth Campbell, the decree below awards in each case $1,500 for pain and suffering due to typhoid fever. Compensation for suffering is incapable of mathematical computation; it depends largely upon the judgment of the triers. Typhoid fever is, at the best, a serious disease. An award of $1,500 as actual compensation for pain and suffering is probably no more than would be given by either court or jury in a normal and individual case. The fact that several cases are involved in one proceeding can make no difference with the individual awards. We see no reason to disturb the judgment of the master and judge as to this feature of damages, or to think it was intended as punitive.

[11] *In the case of Moore* there was an additional award of $2,000 for past and future suffering on account of the gallstone trouble, as well as $1,545.69 for medical expense incident to the typhoid fever and gallstone trouble combined.

Both these awards are criticized as exorbitant, but we think they should be sustained. The record shows that following the removal of the gallstones Moore remained in the hospital three weeks, that the

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wound never healed, that a drainage tube had to be inserted, and a second opening made, which again failed to heal. At the time of the hearing below, nearly two years after the operation, the wound was still open and discharging, requiring daily dressing, and, when it occasionally healed, to be reopened. It need scarcely be said that an open wound of that nature, doubtless due to infection of some kind, is a serious condition, and we cannot pronounce excessive an award of $2,000 therefor.

The medical expenses include doctor's bills of $436.50, hospital expense and nurses' bills aggregating $284.19, a trip to Northern Michigan to recuperate, under orders of the physician, costing $225, and the expenses of a trip South for the same purpose, amounting to about $600. The master found that these expenses were reasonable in amount, and were made necessary by the typhoid fever and gallstone trouble. These items are criticized as being allowed on the mere statement "of Mr. Moore that he had paid the same," but that there was no proof as to what the services consisted of, or whether they were necessary or the amounts reasonable. Moore produced direct proof of the actual payment of each of the claimed disbursements. The natural inference is that in the case of physicians, nurse, and hospital bills he paid the charges made. The entire history of the illness was before the master, who (as well as the judge) presumably had some knowledge of the reasonableness of such charges, especially in Detroit; and, in the absence of specific criticisms that the bills paid were exorbitant, we think the general objection urged should be disregarded.

[12] *As to business damages:* At the time of his illness, and until and at the time of the hearing below, Moore was agent of a company in selling time recorders on a 23 per cent. commission basis, maintaining at his own expense an office at Detroit. He was awarded $7,500 for loss of his time and services to his business from the latter part of June, 1915, to the middle of December, 1915, and $3,500 for additional salaries paid to salesmen after his return to his business, made necessary by his inability to do his usual work. Nothing was allowed for impairment of future earning capacity, the master not being satisfied that future capacity was impaired. The brief of respondent's counsel does not criticize the award for additional salaries, and we think it not open to criticism. There was clear evidence that the salaries paid by Moore in 1915 and 1916 alone were $3,556.09 more than if on the 1914 basis. In 1917 the excess was greater than for 1915 and 1916 combined. The award for loss of time and services from June to December, 1915, is defended largely upon two propositions: (1) There is testimony that Moore's services were worth $15,000 a year, the district sales manager testifying that his company could afford to pay him that; and (2) that Moore had individually, from July 1, 1909, to July 1, 1910 (without employing salesmen) sold $87,000. Moore has apparently given the best detailed data available, which however, related only to the years 1914, 1915, and 1916, and the first eight months of 1917. Excluding, as seems fair for purposes of comparison, the "repair account" (both receipts and disbursements), it appears that in the calendar year 1914 (said to have been a very poor year) the gross com-

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missions amounted to $6,838.47, the expenses to $2,744, leaving net profit $4,094.47. For 1915 the gross commissions were $17,898.24, expenses $3,832.97, net profits $14,065.27. (It is to be noted that the sales for the second half of 1915 were nearly double those for the first half.) For the year 1916 the gross commissions were $23,265.50, the expenses $5,372.12, net profits $17,893.38. For the first 8 months of 1917 gross commissions were $14,398.44, gross expenses $9,321.72, net profits $5,076.72; or, on a 12 months basis, $7,615.08. The salaries for 1917 (the year in which the United States entered the war) are so far in excess of those for the two preceding years as to suggest an increased proportionate expense, perhaps reflected in some measure in the fact that the office rent, which in 1914 and 1915 had been $384, and in 1916 $545, was in the eight months of 1917 $930. It thus appears that the net profits for 1915 and 1916 averaged something more than $15,000 per year, and that the gross commissions for the second half of 1915 were but $1,273.46 less than for the corresponding period of 1916, when sales seem to have reached the high-water mark. We therefore think that an award of more than $1,000 for loss of gross earnings for the approximately six months of 1915 in question would be merely conjectural. The award should be reduced accordingly.

[13] *In the case of Mallotte* the master allowed illness expenses totaling $721.40. Respondent's brief does not criticize this allowance except as to an item of $50 for drugs, which criticism we think without merit. This award should stand. The master also allowed $4,000 for pain and suffering, past and future. This item again is not criticized in counsel's brief, and we think it a reasonable allowance. Mallotte was not out of the house until Labor Day, and used crutches or a cane until December first. At the time of the hearing below he was still obliged to "watch his heart" and could not safely run. He still had frequent trouble with his knee. As to business damage: Libelant was a manufacturers' agent in the sale of automobile materials, maintaining an office, but without any sales assistants. His business was entirely personal, and depended upon direct solicitation. The master found that Mallotte's services were lost partially from June 11 to June 20, 1915, entirely from June 20th to September 15th, and that from the latter date to December 1st he was able to perform only a part thereof, and that the fair and reasonable value of his time and services lost was $7,000. We think this award should be sustained. The undisputed proof of damages is practically a mathematical demonstration. Commissions were received as the result of business placed the previous year. On this basis his commissions for 1913 were $13,679.27; for 1914, $9,944.35; for 1915 (business placed in 1914), $13,067.32; for 1916, $6,926.55 (this latter was practically the result of five months' work in 1915, previous to Mallotte's illness); for 1917 (business placed in 1916), $16,000. The details brought out by both direct and cross-examination fully established the propriety of accepting these figures as the basis of business damage. The award in this respect also should be confirmed.

In the case of Town the master allowed doctor's bill $25.50, drugs $22.50, value of 18 weeks' time and services as secretary of a lumber

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corporation, and $1,500 for pain and suffering. The only allowance criticized is the item for drugs. The criticism is entirely without merit. Libelant testified, approximating from memory, that he paid "between $20 and $25." As stated, the master "split the difference." The award to Town should be confirmed.

[14] *In the case of Kay* there was awarded on account of physician's bill, hire and board of nurses, and extra maid for housework amounts totaling $366. We think the objections to these items are not well taken. There was also awarded for past pain and suffering $2,500, for future suffering $1,500, for loss of time and services in conducting a retail grocery business $40 a week for 15 weeks' total disability, and $20 per week for 20 weeks semi-total disability, these two items amounting to $1,000. For permanent impairment of earning capacity there was awarded the further sum of $2,500.

As to the allowances for pain and suffering and permanent impairment of earning capacity: Kay was confined to his bed from July 3d to September 15th (he was much of the time critically ill); he did not leave the house until a month later; he has not been entirely well since. He testifies that it was not until March, 1917, that he was able to run his business as before, although not then in his former health. He paid $676 for additional help at the store during his illness. At the time of the hearing below he had a blood pressure of 198. His personal efficiency was then estimated by him at about 50 per cent. of normal. He suffers from an impairment of memory as well as of physical strength. His physician thinks he ought to retire from business.

The difficulty lies in determining how much of this impairment and physical suffering is due solely to the typhoid fever and consequent illness. Kay was 53 years old when he made the trip. He testifies that he had had rheumatism off and on for three or four years. From July 22 to September 16, 1912, he was treated for articular rheumatism, involving both knees and both ankles. He was confined to the house a considerable time, and had to use crutches when he got out. He was treated by a physician for a cold in 1913; and in February, 1915 (four months before the trip), he was treated for "an attack of indigestion due to fermentation of food in the bowels." Kay says he had the grippe. The physician says there was good recovery from all the ailments he treated.

Kay had a retail grocery business with a stock of about $3,200. He was the sole proprietor. He attempted to give his annual sales. As construed by respondent's counsel, they appeared to range from $12,000 to $20,000 per year, on which he thought he earned a net profit of 10 per cent. Libelant's counsel construes the testimony as meaning that during his illness the lessened sales ranged between the figures stated. It is not clear which interpretation is correct. He permanently lost many customers, and his business had fallen off to a considerable extent at the time of the hearing. The estimate that his services to his business were worth $40 per week is more or less impaired by the facts (a) that before he was ill he was in the habit of drawing from the business but $15 a week, plus $8 to $10 worth of provisions, and there is

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no evidence that his stock or the value of the business increased; (b) that while he promised to produce his books he for some reason failed to do so; and (c) that the highest salary he seems ever to have received was $35 per week, earned for less than a year managing the business of another, at a period of from 6 to 10 years before he made the boat trip, and when he was younger and presumably capable of earning better wages.

In this uncertain state of the record, we think justice will be more nearly done by reducing the aggregate allowances for pain and suffering, business loss, and permanent impairment of business capacity from the $7,500 allowed to $5,000.

In the case of Elizabeth Campbell there was awarded a gross total of $305.95, including the bills of three physicians amounting to $84, the bill of a nurse $165.50, board of nurse $42, drugs $14.45. It was stipulated that if the father were called as a witness he would testify that he had made the expenditure stated. The commissioner found that all were actually and necessarily incurred and were reasonable in amount. We see no occasion to disturb this award, in the absence of any cross-examination of the witness, or of any objection made to the items at the time the record was made, or of any testimony in dispute of the fact of payment (which seems to have been agreed to), or the reasonableness of the items. What we have said in the case of Moore seems pertinent here.

In the case of Dorothy Ballard the total award was $422, consisting of doctors' bills $117, nurse's compensation $200, nurse's board $40, drugs $40, and long distance calls, telegrams, and incidental expenses in connection with said illness $25. Here again there was no cross-examination, and, so far as we have seen, no critcism of the items before the master. What has been said with reference to the Elizabeth Campbell case applies generally here. The specific criticisms made in the Ballard case do not impress us as meritorious. This award also should be confirmed.

[15] *In the case of the Woodfield sisters* there was an award to each of $1,500 for pain and suffering, and $98.25 as one-half the expenses for physicians and nurses. The two were ill at home at the same time, and we see no objection to this division. In the case of one of them there is an allowance of $20 for the services of help in the home during the illness. Notwithstanding the conflict of authority, we think the fact that libelant's parents, or one or the other of them, paid the doctors' and nurse's bills and the charges of the woman who helped should not preclude recovery. Styles v. Decatur, 131 Mich. 443, 448, 91 N. W. 622; Wells v. Minneapolis Ass'n, 122 Minn. 327, 333, 142 N. W. 706, 46 L. R. A. (N. S.) 606, Ann. Cas. 1914D, 922; note to N. C. & St. L. Ry. v. Miller, 67 L. R. A. at pages 90, 91; 8 Ruling Case Law, p. 555. One of the sisters was allowed $75 for loss of earnings as a music teacher. We think this justifiable. The awards in both these cases should be affirmed.

[16] *In the case of Lawrence* there was an allowance of $1,500 for pain and suffering, $115.50 for medical services and cost of trip to recuperate, $400 for loss of eight weeks' time, at $50 per week, in the

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conducting of a printing business which Lawrence owned and managed. None of these items is, in our opinion, subject to criticism, and none seem to call for discussion. There was also an allowance for six weeks' nursing by libelant's wife at $20 per week. We think an allowance proper under the authorities cited with reference to the Woodfield cases. The amount is criticized as excessive. The attending physician, on cross-examination, testified that had a nurse been employed an attendance of at least two weeks would have been required, and that the minimum charge for doing the sort of work which Mrs. Lawrence did would be $25 a week. Lawrence was in bed with typhoid four weeks, he spent some time on a trip to recuperate, and remained at home for a time after his return from the trip before returning to business. The master might well conclude that a patient ill in bed with typhoid fever required nursing, and there is no room for criticism of an allowance of four weeks' services at the rate allowed. We are disposed to yield to respondent's criticism as to the surplus of $40, in the absence of any testimony, called to our attention or found by us, indicating that more than four weeks' nursing was necessary.

[17] *In the case of Robinson* the master allowed payments for medical services and drugs totaling $216, plus $80 for four weeks' service of libelant's wife in nursing him. Aside from the general objection already passed upon herein, that no recovery can be had for the wife's services, the only definite criticism upon either of these items is that the proof of the amount paid for drugs was insufficient. We think the proof sufficient. Libelant testified that he kept no account of the payments, but thought they amounted to about $25. The award to libelant of $250 for two months' loss of business in soliciting life insurance, whose annual income averaged $1,500, was amply justified. There was an award of $2,000 for pain and suffering and an alleged serious permanent physical impairment. There was substantial evidence of such impairment. The master apparently took into account libelant's advanced age, and made what would seem a conservative allowance, which amounts to but $500 beyond the usual allowance for pain and suffering. The awards in this case should be confirmed.

9. In the case of several of the libelants we are asked to increase the allowance of damages made by the court below. Upon this subject we think it enough to say that, assuming that we have power to do so (referring to the discussion in the seventh paragraph of this opinion), we are not convinced that the evidence preponderates in favor of higher awards than made by the master and District Judge.

[18] 10. *Interest.* The interlocutory decree and order of reference was dated June 28, 1917; the master's report was dated May 25, 1918. The final decree allowed interest on the various awards from the last-named date; exception to the report, for the reason that interest should have run from the date of the interlocutory decree, being overruled by the District Judge. We think this action should not be disturbed, notwithstanding the master's supplemental report states that the damages found were fixed as of the date of the interlocutory decree. The allowance generally in the federal courts of interest on damages is not an absolute right. The general practice in admiralty is to allow in-

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terest from the date of the filing of the commissioner's report (Gt. Lakes Towing Co. v. Kelley Island L. & T. Co. [C. C. A. 6] 176 Fed. 492, 498, 100 C. C. A. 108), but the question of its allowance, including the period from which it shall run, rests largely in the discretion of the court which passes upon the subject (The Scotland, 118 U. S. 518, 6 Sup. Ct. 1174, 30 L. Ed. 153); and this discretion will not be reviewed unless it has been palpably abused (Gt. Lakes Towing Co. v. Kelley Island Co., supra). On this subject the District Judge said:

"I have carefully considered the findings of the commissioner on the subject of damages and fully agree therewith. No undue delay ensued between the date of the interlocutory decree and the time of the hearing before the commissioner or of the filing of his report; it does not appear that the wrongful acts of the respondent were deliberate or willful; nor does any other reason for the allowance of interest upon the damages appear. Therefore no such interest will be allowed prior to the filing of the commissioner's report."

It surely cannot be said that the discretion vested in the court below has been palpably abused, and the action had upon that subject should not be disturbed. We find nothing to the contrary of this conclusion in the decision of this court in Thompson Towing, etc., Ass'n v. McGregor, 207 Fed. 209, 221, 124 C. C. A. 479. That case involved considerations not present here, viz. the application of the rule as to interest adopted by the state under whose statute damages for wrongful death are recovered in the court of admiralty.

It results from these views that the decree of the District Court should be sustained except in the respects in which a contrary conclusion is announced herein, and that for reasons specially stated herein the decree should be reversed and the record remanded to the District Court, with directions to enter a decree in accordance with this opinion.

The appellees other than Hudson, Moore, and Kay will recover their costs of this court. The appellant will recover against the three libelants last named each one-eleventh of its costs of this court.

(259 Fed. 507)

FARAONE v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. June 30, 1919.)

No. 3271.

1. INTERNAL REVENUE ⟹47—LIQUOR TAX—EVIDENCE—SUFFICIENCY.
   Evidence *held* to warrant defendant's conviction on the charge that he was carrying on a retail liquor business without having paid the required special tax.

2. CRIMINAL LAW ⟹330—EVIDENCE—DEFENSIVE MATTER PECULIARLY WITHIN KNOWLEDGE OF DEFENDANT.
   Where defendant was charged with carrying on the business of a retail liquor dealer without having obtained a federal license and paid the special tax, the government need not prove the nonpayment of tax, for the matter was peculiarly within the knowledge of defendant, and he might prove payment without inconvenience.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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3. INTERNAL REVENUE ⟹47—LIQUOR TAX—EVIDENCE—REPUTATION.
In a prosecution for carrying on the business of a retail liquor dealer without having paid special federal tax, the refusal of the trial court to allow proffered witnesses to testify as to whether they had ever heard of liquor being sold at defendant's place of business cannot be held error, where the record did not disclose the opportunity such witnesses had for knowing the defendant's reputation or the reputation of his place of business.

4. INTERNAL REVENUE ⟹47—LIQUOR TAX—INSTRUCTIONS.
In a prosecution against defendant, a grocer, for carrying on a retail liquor business without paying the special federal tax, a special charge that, if the sales testified to by the prosecuting witness were made by defendant's clerk, it was necessary to prove that the clerk was his agent and acted with his knowledge, was properly refused, for, while defendant could not be convicted on proof of sales made by his clerk without his knowledge, yet the vital question in the case was not whether any particular sales were made, but whether defendant was carrying on the business of retail liquor dealer without payment of the special tax, and hence the request was predicated on a false issue.

In Error to the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

Nick Faraone was convicted of carrying on the business of retail liquor dealer without having paid the special tax required therefor by federal law, and he brings error. Affirmed.

Clarence Friedman, of Memphis, Tenn., for plaintiff in error.

Wm. D. Kyser, U. S. Atty., of Memphis, Tenn.

Before KNAPPEN and DENISON, Circuit Judges, and HOLLISTER, District Judge.

HOLLISTER, District Judge. The plaintiff in error, Nick Faraone, herein called defendant, was tried on an indictment charging that in 1917, at Memphis, Tenn., he "did carry on the business of a retail liquor dealer without having paid the special tax therefor, as required by law," and was convicted and sentenced to imprisonment, and to pay a fine.

At the trial there was evidence tending to show that in September, 1917, J. W. Harris, of Savage, Miss., riding in his automobile to Memphis, purchased at defendant's grocery at Memphis, from defendant himself a half pint of whisky, for which he paid $2; that again, in October or November, 1917, he stopped at defendant's store and bought a half pint of whisky from defendant's clerk; and that on each occasion the whisky was taken from the same place behind the counter in the store.

A deputy United States marshal testified that in December he found in the lot in the rear of defendant's grocery, and about 50 feet therefrom, sunk in a hole in the ground, a barrel in which were two sacks containing about 40 half pint bottles of whisky, and in a room adjoining the grocery about 500 empty half pint bottles. A detective of the city of Memphis, who was with the deputy marshal, corroborated him, and said also that in the cellar of the house, and in the lot, there were several barrels sunk in the ground similar to the barrel in which the whisky was found.

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No reference need be made to defendant's testimony, except to say that he denied having sold any whisky to Harris or to any one, and said that he had not authorized his clerk to sell whisky.

[1] From all the testimony in the case, the jury was amply justified in finding that the defendant carried on the business of retail liquor dealer at the time and place charged.

[2] The government made no offer to prove the averment in the indictment that the special tax required by law was not paid, and the defendant made no reference to the subject in his testimony. It was evidently assumed by court and counsel that proof of such a negative averment is not required. The assumption was justified by the authorities and on reason. If payment had been made, the fact was peculiarly within defendant's knowledge, and he could have shown it without inconvenience. He could thereby have prevented any proceedings against him, or could have brought them to an end at any time. The subject is discussed at length in 2 Chamberlayne's Evidence, § 983, with references to many cases. See, also, 1 Greenleaf on Evidence, § 79 (16th Edition), and cases directly in point; Williams v. People, 121 Ill. 84, 11 N. E. 881; People v. Boo Doo Hong, 122 Cal. 602, 55 Pac. 402; State v. Foster, 23 N. H. 348, 55 Am. Dec. 191; State v. Shaw, 35 N. H. 217; Wheat v. State, 6 Mo. 455.

[3] It is claimed, however, that error intervened because the court would not permit each of three certain witnesses, concerning whom the record tells us nothing excepting their names and that they had testified to defendant's "good character," to answer the question "Whether he had ever heard of any whisky being sold at defendant's place of business." Who these three proffered witnesses were, and what opportunities they had of knowing defendant's reputation or the reputation of his place of business, are not disclosed by this record.

It is elementary that reputation can only be proved by those who have the means of knowing it. These must show, either on direct or cross examination, their sources of knowledge before they can, in any event, become qualified to testify.

Assuming that these witnesses, having been permitted to testify as to defendant's general "good character" (of course, they could only testify as to reputation) in the community in which he lived, had shown sufficient qualifications for that purpose, and assuming, further, for the purposes of this opinion, that the question put would have been permissible if a proper foundation had been laid for it, it is sufficient to say that it does not appear from the showing made or offered that these witnesses had such familiarity with defendant's place of business as would have rendered their testimony on the subject competent or material. There was no error in sustaining the objection to the question.

[4] The general charge of the court was not excepted to, and presumably covered the law of the case. After that charge, however, defendant's counsel asked the court to give a special charge:

"That if they did not believe that the whisky was purchased by Harris from defendant, but did believe that Harris purchased the same from his clerk, in order to convict the defendant the jury must further be satisfied from the

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evidence that the clerk who made the sale, made it as his agent, and with the knowledge of the defendant."

The court refused to so charge, and instead said to the jury:

"In that connection I instruct you that if you find beyond a reasonable doubt that the defendant had and kept intoxicating liquors for sale at his place of business and you further find that at both sales testified to by government witnesses the defendant was not present and you also find that his clerk made both sales, in the conduct of defendant's business while the latter was absent, in such circumstances it would not be necessary to prove that defendant had actual knowledge of either or both sales, in order to establish his guilt."

To the refusal to charge as requested, and to this charge as given, counsel duly excepted and assigned error.

The trial judge was right in refusing to give the charge asked for and in charging the jury as he did. The vital question in the case was not based alone on any particular sale or sales of whisky by the defendant himself or by his clerk. The question was whether, at the time and place charged, the defendant carried on the business of a retail liquor dealer. Facts shown by the evidence other than the sales themselves were involved in the solution of that question.

There are many cases in which it is held that charges of law-breaking by the sale of liquor cannot rightfully be made against a principal because of sales by his clerk without the principal's knowledge or consent. This is no more than saying that a man who is innocent of an offense cannot be rightfully convicted of having committed it. The charge asked for was predicated on a false issue, to the exclusion of the real issue in the case. The sales themselves were but items of evidence to be considered by the jury, together with the other evidence, in determining whether or not the defendant was carrying on a retail liquor business.

Two sales of whisky by a clerk in a grocery, without the consent of the owner and without his authority, would not, of course, make defendant's grocery a place in which he was also carrying on a retail liquor business; but two sales of whisky by his clerk, though without his knowledge of the particular sales, tending to show, with other evidence, that those two sales were part of many others in the past, and a part of many others to be made in the future, were probative of the charge that the defendant was carrying on a retail liquor business. And it is quite immaterial, if true, that defendant did not know of these two particular sales or that he had not authorized them to be made. The vice in the requested charge is that it singled out particular circumstances, while omitting all reference to others of importance. It is not error to refuse such a charge. Railway Co. v. Leak, 163 U. S. 280, 16 Sup. Ct. 1020, 41 L. Ed. 160; Coffin v. U. S., 162 U. S. 664, 16 Sup. Ct. 943, 40 L. Ed. 1109; Railway Co. v. Svedborg, 194 U. S. 201, 24 Sup. Ct. 656, 48 L. Ed. 935; Railway Co. v. Ives, 144 U. S. 408, 433, 12 Sup. Ct. 679, 36 L. Ed. 485.

It thus being shown that the trial judge committed no errors in the particulars assigned, the judgment below will be affirmed, at the costs of the plaintiff in error.

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(259 Fed. 525)

JACOB HOFFMAN BREWING CO. v. McELLIGOTT, Deputy Internal Revenue Collector, et al. CLAUSEN-FLANAGAN BREWERY v. SAME. RUPPERT v. SAME.

(Circuit Court of Appeals, Second Circuit. June 28, 1919.)

1. INJUNCTION ⟹75—INTERNAL REVENUE COLLECTOR—WAR-TIME PROHIBITION.

Where the Internal Revenue Department refused to license or sell revenue stamps to concerns which it claimed were violating the War-Time Prohibition Act of November 21, 1918, but this refusal was later abandoned, *held* that an acting deputy collector may be enjoined from reverting to the original practice of the department.

2. UNITED STATES ⟹125—SUITS AGAINST.

The United States may not be sued except with its consent.

3. INDICTMENT AND INFORMATION ⟹28—FEDERAL COURTS.

A criminal suit in the federal courts must be brought in the name of the United States and by the United States attorney.

4. UNITED STATES ⟹125—SUITS AGAINST.

A suit to enjoin a United States attorney from instituting criminal proceedings under a federal statute is a suit against the United States, which cannot be maintained unless property rights are threatened with irreparable damage, and the statute is either unconstitutional or the attorney is transcending his authority under a valid statute.

5. INTOXICATING LIQUORS ⟹134—WAR-TIME PROHIBITION ACT—CONSTRUCTION.

The War-Time Prohibition Act of November 21, 1918, prevents only the manufacture and sale of beer, wine, etc., which is in fact intoxicating.

6. INJUNCTION ⟹105(1)—CRIMINAL PROCEEDINGS—WAR-TIME PROHIBITION ACT.

A federal district attorney cannot be enjoined from instituting criminal proceedings under the War-Time Prohibition Act of November 21, 1918, against concerns manufacturing and selling nonintoxicating beer, upon the ground that the attorney had transcended his authority by invoking the act against nonintoxicating liquors.

Rogers and Hough, Circuit Judges, dissenting in part.

Three suits, by the Jacob Hoffman Brewing Company, by the Clausen-Flanagan Brewery, and by Jacob Ruppert, a corporation, respectively, against Richard J. McElligott, Acting and Deputy Collector of Internal Revenue, and Francis G. Caffey, United States Attorney for the Southern District of New York. From orders granting preliminary injunctions (259 Fed. 321), the defendants appeal. Affirmed as modified.

Francis G. Caffey, U. S. Atty., of New York City (William C. Fitts, Vincent H. Rothwell, and Cornelius J. Smyth, all of New York City, of counsel), for appellants.

Root, Clark, Buckner & Howland, of New York City (Elihu Root and William D. Guthrie, both of New York City, of counsel), for appellee Jacob Hoffman Brewing Co.

Guggenheimer, Untermyer & Marshall, of New York City (Elihu Root and William D. Guthrie, both of New York City, of counsel), for appellee Clausen-Flanagan Brewery.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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Fitch & Grant, of New York City (Elihu Root and William D. Guthrie, both of New York City, of counsel), for appellee Jacob Ruppert.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

WARD, Circuit Judge. These three cases involve the same question, and in each the appeal is from an order of the District Court of the United States for the Southern District of New York restraining, pending final hearing, the defendant McElligott, Acting and Deputy Collector of Internal Revenue of the Third District of New York, from refusing to issue licenses to the complainants as brewers of beer, or to issue revenue stamps in respect to their beer, provided they pay or duly tender the taxes required by law, and restraining the defendant Caffey, United States Attorney for the Southern District of New York, from arresting or prosecuting the complainants, their officers, agents, servants, etc., or from enforcing forfeiture of their property for failure to affix revenue stamps to their barrels of beer when such failure is due to the refusal of the defendant McElligott to issue the same, and from enforcing the pains and penalties of the act of November 21, 1918, c. 212, 40 Stat. 1046, by arresting or prosecuting the complainants, their officers, agents, etc.

The complainants are brewers of beer made from malt with an alcoholic content not exceeding 2.75 per cent. by weight, and the rights of the parties in connection with the orders appealed from depend upon the act of Congress of November 21, 1918, the relevant portions of which are:

"That after June 30, 1919, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, for the purpose of conserving the man power of the nation, and to increase efficiency in the production of arms, munitions, ships, food, and clothing for the army and navy, it shall be unlawful to sell for beverage purposes any distilled spirits, and during said time no distilled spirits held in bond shall be removed therefrom for beverage purposes except for export. After May 1, 1919, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, no grains, cereals, fruit, or other food product shall be used in the manufacture or production of beer, wine, or other intoxicating malt or vinous liquor for beverage purposes. After June 30, 1919, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, no beer, wine, or other intoxicating malt or vinous liquor shall be sold for beverage purposes except for export. The Commissioner of Internal Revenue is hereby authorized and directed to prescribe rules and regulations subject to the approval of the Secretary of the Treasury, in regard to the manufacture and sale of distilled spirits and removal of distilled spirits held in bond after June 30, 1919, until this act shall cease to operate, for other than beverage purposes; also in regard to the manufacture, sale, and distribution of wine for sacramental, medicinal, or other than beverage uses. After the approval of this act no distilled, malt, vinous, or other intoxicating liquors shall be imported into the United States during the continuance of the present war and period of demobilization: Provided, that this provision against importation shall not apply to shipments en route to the United States at the time of the passage of this act.

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"Any person who violates any of the foregoing provisions shall be punished by imprisonment not exceeding one year, or by fine not exceeding $1,000, or by both such imprisonment and fine. * * *"

[1] Originally the Internal Revenue Department took the position that after May 1, 1919, it would not license brewers who manufactured beer with an alcoholic content equaling or exceeding one-half of 1 per cent. by volume, nor sell the revenue stamps to be affixed to barrels of such beer; but afterwards, by advice of the Attorney-General, this position was abandoned, and the department consented to license brewers and to sell them revenue stamps, even if their beer did contain an alcoholic content equaling or exceeding one-half of 1 per cent. by volume. Accordingly the complainants are not now subject to any forfeiture or penalty under the internal revenue acts if they pay the taxes required by law. The only risk they are exposed to if they continue to brew beer of an alcoholic content not exceeding 2.75 per cent. by weight is that of imprisonment for not more than one year, or a fine not exceeding $1,000, or both, if such manufacture be found to be a violation of the act of November 21, 1918. Nevertheless the injunction against the acting deputy collector, defendant, can do no harm, and, in view of the position originally taken by the Internal Revenue Department, it may go against him.

In this case we have not to inquire whether an administrative board is acting without or beyond its jurisdiction (Gegiow v. Uhl, 239 U. S. 3, 36 Sup. Ct. 2, 60 L. Ed. 114), or to deal with any attack upon or interference with the complainants' property (United States v. Lee, 106 U. S. 196, 1 Sup. Ct. 240, 27 L. Ed. 171), or of confiscation of it, as in the Rate Cases.

[2-4] It is perfectly well settled that the United States may not be sued, except upon its own consent. Such consent it has given by various statutes which do not apply to the case under consideration. There is no difference between the states and the United States in respect to this immunity from suit. It is an attribute of every sovereign, recognized by all sovereigns. A criminal suit in the federal courts must be brought in the name of the United States, and can only be brought by the United States attorney. Confiscation Cases, 7 Wall 454, 457, 19 L. Ed. 196. A suit in equity to enjoin the United States attorney from instituting criminal proceedings under a statute of the United States is manifestly a suit against the United States. In such a case the United States is sued as effectively as if it were a defendant by name. There is, however, a well-recognized exception to the rule, viz. if property rights are invaded, and the statute in question is unconstitutional, it is void, is to be treated as nonexistent, and so no defense to the United States attorney. When instituting criminal proceedings under it he is to be regarded not as representing the United States in his official capacity, but as acting individually. So if, under a valid statute, he threatens to proceed in a manner injurious to complainant's property rights, and not authorized by the statute, he transcends his authority, does not represent the United States, is not protected by the statute, and may be enjoined. Irreparable injury alone is not enough. Both these conditions must exist. Obviously

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in such cases the constitutionality of the statute, or the question whether the United States attorney has transcended his authority, must be determined by the court before it can determine whether the particular suit is or is not against the United States. Mr. Justice Peckham said in Ex parte Young, 209 U. S. 123, 159, 28 Sup. Ct. 441, 453 (52 L. Ed. 714, 13 L. R. A. [N. S.] 932, 14 Ann. Cas. 764):

"It is also argued that the only proceeding which the Attorney General could take to enforce the statute, so far as his office is concerned, was one by mandamus, which would be commenced by the state in its sovereign and governmental character, and that the right to bring such action is a necessary attribute of a sovereign government. It is contended that the complainants do not complain and they care nothing about any action which Mr. Young might take or bring as an ordinary individual, but that he was complained of as an officer to whose discretion is confided the use of the name of the state of Minnesota so far as litigation is concerned, and that when or how he shall use it is a matter resting in his discretion, and cannot be controlled by any court.

"The answer to all this is the same as made in every case where an official claims to be acting under the authority of the state. The act to be enforced is alleged to be unconstitutional, and, if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the state to enforce a legislative enactment which is void because unconstitutional. If the act which the state Attorney General seeks to enforce be a violation of the federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character, and is subjected in his person to the consequences of his individual conduct. The state has no power to impart to him any immunity from responsibility to the supreme authority of the United States. See In re Ayers, supra [123 U. S.] p. 507 [8 Sup. Ct. 164, 31 L. Ed. 216]. It would be an injury to complainant to harass it with a multiplicity of suits or litigation generally in an endeavor to enforce penalties under an unconstitutional enactment, and to prevent it ought to be within the jurisdiction of a court of equity. If the question of unconstitutionality with reference, at least, to the federal Constitution, be first raised in a federal court, that court, as we think is shown by the authorities cited hereafter, has the right to decide it, to the exclusion of all other courts."

The act of November 21, 1918, is a war measure, constitutional as such, and by its express terms is to continue in force until a time which has not yet been reached, i. e., the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States. Until such time it is the duty of the United States attorney, defendant, under section 771, United States Revised Statutes (Comp. St. § 1296), to prosecute all delinquents for crimes and offenses covered by it.

The sole ground upon which the United States attorney, defendant in this case, is charged with transcending his authority is that he erroneously construes the statute in connection with the complainant's product, viz. as prohibiting the use of food products in the manufacture of any beer for beverage purposes after May 1, 1919, and the sale of such beer after June 30, 1919; whereas, the act, properly construed, prohibits only the manufacture and sale of such beer as is intoxicating, which the complainants' beer, containing not more than 2.75 per cent. of alcohol by weight, is not.

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[5, 6] Although we concur in the construction of the statute by the court below, and assume that the United States attorney will institute criminal proceedings, we do not think the court had power to stay him by injunction from doing so. The proper place for determining whether such criminal proceedings are maintainable is not in a court of equity, but upon an indictment tried in a criminal court before a jury. For any error then committed there will be an adequate remedy by writ of error. We recognize the importance of the interests at stake; that the complainants and others in like case, if not content to manufacture beer containing an alcoholic content not equaling or exceeding one-half of 1 per cent. by volume, must choose between discontinuing their business or carrying it on at the risk of punishment under the act of November 21, 1918, if they continue after May 1, 1919, to manufacture, and after June 30, 1919, to sell, beer containing not more than 2.75 per cent. of alcohol by weight. The question, however, is not one of convenience or of discretion, but of the power of the court; and we think such an extension of judicial power, to meet what seems to be a hard case, to the domain of the executive department and of the courts of common law, would be an injury to our system of jurisprudence still more serious.

This precise question was decided in accordance with these views by the Circuit Court of Appeals for the Sixth Circuit in Arbuckle v. Blackburn, 113 Fed. 616, 51 C. C. A. 122, 65 L. R. A. 864. Judge Day, who as Justice Day wrote the opinion in the Hammer Case, 247 U. S. 251, 38 Sup. Ct. 529, 62 L. Ed. 1101, Ann. Cas. 1918E, 724, greatly relied upon by the complainants, and to be presently considered, said:

"We are now dealing with an officer of a state proceeding under a valid law of the state, and whose error lies in wrongfully construing the statute so as to include the complainant's product. To entertain the bill in this aspect would be to subvert the administration of the criminal law, and deny the right of trial by jury, by substituting a court of equity to inquire into the commission of offenses where it would have no jurisdiction to punish the parties if found guilty. It would be the extension of equity jurisdiction to cases where prosecutions in state courts by the state officers are sought to be enjoined, with a view to determining whether they shall be allowed to proceed under valid statutes in the courts of law. We think this an enlargement of the jurisdiction opposed to reason and authority. It is claimed, however, that conceding that a court of equity cannot enjoin the prosecution of criminal offenses, as a general thing, the rule is different when property rights are involved; and we are cited to cases holding that equity has jurisdiction to enjoin acts likely to be destructive of property rights, although the acts complained of constitute infractions of the criminal law. This is quite a different proposition from enjoining criminal proceedings alleged to be indirectly destructive of property rights. Many criminal prosecutions may affect the property of the person accused. A property may be greatly injured by the wrongful and unfounded charge that it is used for immoral purposes. Such prosecution may destroy its rental value and prevent its sale, yet a court of equity could not usurp the right of trial which both the state and the accused have in a common-law court before a jury. Every citizen must submit to such accusations, if lawfully made, looking to the vindication of an acquittal and such remedies as the law affords for the recovery of damages. It is often a great hardship to be wrongfully accused of crime, but it is one of the hardships which may result in the execution of the law, against which courts of equity are powerless to relieve. Suess v. Noble (C. C.) 31 Fed. 855; Hemsley v. Myers (C. C.) 45

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Fed. 283; Kramer v. Board, 53 N. Y. Super. Ct. 492; Food Co. v. McNeal, 1 Ohio, N. P. 266."

District Judge Grubb in Central Consumers Co. v. Austin, 238 Fed. 616, arrived at the same conclusion. It is said that these cases are inconsistent with the decision in Ex parte Young, supra. In that case the defendant Young, Attorney General of Minnesota, had been enjoined by the Circuit Court of the United States from enforcing an act of the state of Minnesota fixing the charges for freight transportation at rates found to be confiscatory. After this order was entered in the federal court the Attorney General, in direct defiance of it, applied to a state court for a writ of mandamus compelling the railroad company to comply with certain provisions of the state act. For this he was adjudged by the Circuit Court to be in contempt, and put in custody of the United States marshal. Thereupon he applied to the Supreme Court for leave to file a petition for writs of habeas corpus and certiorari, which the court denied. The act was held to be unconstitutional because, among other reasons, it had been found by the lower court to be confiscatory of the railroad company's property. The general rule that courts of equity have no jurisdiction to enjoin criminal proceedings was fully recognized, but the injunction was sustained because of certain exceptions to the general rule within which that case fell. Mr. Justice Peckham said, at page 161 of 209 U. S., at page 454 of 28 Sup. Ct. (52 L. Ed. 714, 13 L. R. A. [N. S.] 932, 14 Ann. Cas. 764):

"It is further objected (and the objection really forms part of the contention that the state cannot be sued) that a court of equity has no jurisdiction to enjoin criminal proceedings, by indictment or otherwise, under the state law. This, as a general rule, is true. But there are exceptions. When such indictment or proceeding is brought to enforce an alleged unconstitutional statute, which is the subject-matter of inquiry in a suit already pending in a federal court, the latter court, having first obtained jurisdiction over the subject-matter, has the right, in both civil and criminal cases, to hold and maintain such jurisdiction, to the exclusion of all other courts, until its duty is fully performed. Prout v. Starr, 188 U. S. 537, 544 [23 Sup. Ct. 398, 47 L. Ed. 584]. But the federal court cannot, of course, interfere in a case where the proceedings were already pending in a state court. Taylor v. Taintor, 16 Wall. 366, 370 [21 L. Ed. 287]; Harkrader v. Wadley, 172 U. S. 148 [19 Sup. Ct. 119, 43 L. Ed. 399].

"Where one commences a criminal proceeding who is already party to a suit then pending in a court of equity, if the criminal proceedings are brought to enforce the same right that is in issue before that court, the latter may enjoin such criminal proceedings. Davis, etc., Co. v. Los Angeles, 189 U. S. 207 [23 Sup. Ct. 498, 47 L. Ed. 778]. In Debbins v. Los Angeles, 195 U. S. 223–241 [25 Sup. Ct. 18, 49 L. Ed. 169], it is remarked by Mr. Justice Day, in delivering the opinion of the court, that 'it is well settled that where property rights will be destroyed, unlawful interference by criminal proceedings under a void law or ordinance may be reached and controlled by a court of equity.' Smyth v. Ames [169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819], supra, distinctly enjoined the proceedings in indictment to compel obedience to the rate act.

"These cases show that a court of equity is not always precluded from granting an injunction to stay proceedings in criminal cases, and we have no doubt the principle applies in a case such as the present. In re Sawyer, 124 U. S. 200, 211 [8 Sup. Ct. 482, 31 L. Ed. 402], is not to the contrary. That case holds that in general a court of equity has no jurisdiction of a bill to stay criminal proceedings, but it expressly states an exception, 'unless they are instituted by a party to the suit already pending before it and to try the same right that

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is in issue there.' Various authorities are cited to sustain the exception. The criminal proceedings here that could be commenced by the state authorities would be under the statutes relating to passenger or freight rates, and their validity is the very question involved in the suit in the United States Circuit Court. The right to restrain proceedings by mandamus is based upon the same foundation and governed by the same principles."

The case under consideration does not fall within any of these exceptions. See, also, Davis v. Los Angeles, 189 U. S. 207, 23 Sup. Ct. 498, 47 L. Ed. 778.

Only two cases are referred to in which United States attorneys have been enjoined, and the complainants rely upon them as showing that this question of jurisdiction was disregarded. Wilson v. New, 243 U. S. 332, 37 Sup. Ct. 298, 61 L. Ed. 755, L. R. A. 1917E, 938, Ann. Cas. 1918A, 1024, and Hammer v. Dagenhard, 247 U. S. 251, 38 Sup. Ct. 529, 62 L. Ed. 1101, Ann. Cas. 1918E, 724. In them, as in the case under consideration, only injunctive relief was prayed for. The moment that relief was granted or denied the suit was at an end. The only difference is that, the decree in the two cases cited being final, an appeal lay directly to the Supreme Court (section 238, Judicial Code, Act March 3, 1911, c. 231, 36 Stat. 1157 [Comp. St. § 1215]), whereas in this case, the order being interlocutory, appeal lay only to the Circuit Court of Appeals (section 129, Judicial Code [Comp. St. § 1121]). It is said that because the Supreme Court disposed of the two cases cited it actually exercised the jurisdiction which the complainants deny the court in this suit has. Jurisdiction as a federal court is plain in all three cases, but this does not prove that a suit against the United States can be maintained either by consent of the parties or of the court or by oversight of either or both. The right to maintain the suits, i. e., to give the injunctive relief prayed for, could not be determined until the court had ascertained whether they fell within the general rule or within the exception. In Wilson v. New the moment the court found the act constitutional, from proceeding under which the United States attorney had been enjoined, the suit was necessarily found to be one against the United States, and the injunction improper, without any reference to the property rights involved. So in Hammer v. Dagenhard, the moment the statute was found to be unconstitutional, and the complainant's right to employment directly invaded by its enforcement, the suit was necessarily found not to be against the United States, and the injunction was proper within the well-established exception. The decisions in these cases do not impair the general rule as to suits against the United States, or extend the exception to that rule. The whole attention of the court was directed to the vital question of constitutionality, and the fact that it did not restate well-established law does not convince us that it intended to depart therefrom.

We are sure that the United States attorney will co-operate with the complainants to have the question involved determined as speedily, and in the meantime with as little interference with their business, as possible.

Because the suit, so far as the defendant Caffey, United States attorney, is concerned, is against the United States, and there is no

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direct injury to the complainants' property rights, and the act of Congress under which it is charged he is threatening to proceed is constitutional, and in so proceeding he will not transcend his authority under the act, the order of the court below is modified by striking out the injunction pendente lite against him, and as so modified is affirmed.

ROGERS, Circuit Judge (dissenting in part). I concur in the foregoing opinion in so far as it holds that the injunction cannot issue to restrain the United States attorney from instituting criminal prosecutions under the acts of Congress approved August 10, 1917, c. 53, 40 Stat. 276 (Comp. St. 1918, §§ 3115⅛e to 3115⅛r), and November 21, 1918. The importance of this case to the government and to the complainants, and the fundamental principle which is involved and which goes to the jurisdiction of the equity courts, makes it my duty to state the reasons upon which my conclusion is based.

The learned District Judge has rendered an opinion in which he has denied a motion to dismiss the bill of complainant, and a preliminary injunction has accordingly been issued restraining the United States attorney and the acting and deputy collector of internal revenue of the Third district of New York from enforcing, pending final hearing, certain acts of Congress. It seems to me that the rulings made are contrary to the powers of a court of equity, and are due to a misapprehension of certain decisions of the Supreme Court of the United States.

The court of chancery was founded on the inefficiency of the ordinary tribunals to do complete justice in civil matters. Almost at the same time and for a like reason the court of star chamber was established, and both had their origin in the royal prerogative. The star chamber grew out of the failure of the ordinary tribunals to do complete justice in criminal matters and other offenses of an extraordinary and dangerous character, and its jurisdiction was confined to cases partaking of a criminal character. Select Essays in Anglo-American Legal History, vol. 2, pp. 251, 252. We accordingly find it laid down with unanimity by the text-writers that criminal proceedings are not enjoined in equity.

In Pomeroy's Equity Jurisprudence (sec. 1361, p. 396, note) that distinguished authority states that "criminal proceedings will never be enjoined"; citing Kerr v. Corporation of Preston, L. R. 6 Ch. Div. 463; Saule v. Browne, Id. 10 Ch. Div. 64; Portis v. Fall, 34 Ark. 375; Phillips v. Stone Mt., 61 Ga. 386. This accords with the general principle that when a cause belongs to the jurisdiction of the law courts equity will never interfere to restrain the prosecution of the action nor to stay proceedings on the judgment or execution upon mere legal grounds.

In Bispham's Equity (8th Ed., § 424) it is laid down that "proceedings in criminal courts will not be interfered with by injunction unless the proceedings are commenced by a person who is also plaintiff in equity relative to the same matter." The author notes no other exception. The exception to which he refers comes under the right of

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the equity court to control the conduct of parties who seek its aid in furtherance of their civil rights. The defendant in the bill and in the criminal proceeding must be the same person, and the question raised and the object sought in the two proceedings must be identical.

In Maitland's Equity (page 261) that distinguished legal scholar says:

"A civil court, again, must not prohibit a man from instituting criminal proceedings."

In Story's Equity Jurisprudence (section 893) the law is stated as follows:

"There are, however, cases in which courts of equity will not exercise any jurisdiction by way of injunction to stay proceedings at law. In the first place, they will not interfere to stay proceedings in any criminal matters or in any cases not strictly of a civil nature. As, for instance, they will not grant an injunction to stay proceedings on a mandamus, or an indictment, or an information, or a writ of prohibition. But this restriction applies only to cases where the parties, seeking redress by such proceedings, are not the plaintiffs in equity; for, if they are, the court possesses power to restrain them personally from proceeding, at the same time upon the same matter of right, for redress in the form of a civil suit and of a criminal prosecution. In such cases the injunction is merely incidental to the ordinary power of the court to impose terms upon parties who seek its aid in furtherance of their rights."

In Eden on Injunctions, 66, it is said:

"It is an established rule that an injunction, or any order in the nature of an injunction, will not be granted to restrain proceedings in a criminal matter."

In Kerr on Injunctions (4th Ed. p. 7), the leading English authority on the subject, it is said:

"The court will not interfere by injunction in matters merely criminal or immoral, which do not affect any right to property. But if an act which is criminal touches also the enjoyment of property, the court has jurisdiction, but its interference is founded solely on the ground of injury to property."

In High on Injunctions (section 68, 4th Ed.) it is laid down that—

"since courts of equity deal only with civil and property rights, they will not interfere by injunction with criminal proceedings, having no jurisdiction or power to afford relief in such cases. Jurisdiction over such actions is conferred upon courts especially created to hear them, and, with few exceptions, it is beyond the power of equity to control or in any manner interfere with such proceedings by injunction."

And the exceptions he refers to do not include a case like the present. He goes on to say:

"So equity will not interfere by injunction to restrain municipal officers from the prosecution of suits for the violation of city ordinances, such proceedings being of a quasi-criminal nature, since equity will not interfere with the execution of the criminal law, whether pertaining to the state at large or to municipalities which are agents in the administration of civil governments."

In Spelling on Injunctions (2d Ed., vol. 2, § 24) it is said:

"Equity has no jurisdiction to interpose for the prevention of crime, or to enforce moral obligations, nor will it interfere for the prevention of illegal acts, merely because they are illegal. Nor have the courts of equity jurisdis-

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tion to prevent by injunction the institution of bona fide prosecutions for criminal offenses, whether the same be violations of state statutes or municipal ordinances."

Lord Chief Justice Holt, of the Queen's Bench, said in the case of Holderstaffe v. Saunders, 6 Mod. 16 (1703), when counsel suggested that an injunction be sought in chancery, that—

"Surely chancery will not grant an injunction in a criminal matter under examination in this court; and that, if they did, this court would break it, and protect any that would proceed in contempt of it."

In 1742, in the Mayor and Corporation of York, 2 Atkins, 302, the plaintiffs claimed the sole right of fishing in the River Ouse; the defendants claimed the same right, and a bill and cross-bill were brought to establish their several rights. While these suits were pending the plaintiffs caused the agents of the defendant to be indicted at the York sessions, where they themselves were judges, for a breach of the peace, in fishing in their liberty. An application for an injunction was made to the Lord Chancellor (Hardwicke).

"This court," said the chancellor, "has not originally and strictly any restraining power over criminal prosecutions. * * * If actions of trespass had been brought vi et armis this court would have stopped them; but though I cannot grant an injunction, yet I may certainly make an order upon the prosecutors to prevent the proceeding on the indictment. * * * Where parties submit their right to the court, they have certainly a jurisdiction and may interpose."

In 1751, in Montague v. Dudman, 2 Ves., Sr., 396, Lord Chancellor Hardwicke said:

"This court has no jurisdiction to stay proceedings on a mandamus, nor to an indictment, nor to any information, nor to a writ of prohibition, that I know of."

In 1827, in Macaulay v. Shackell, 1 Bligh's New R. 96, 127, Lord Eldon declared that "a court of equity has no criminal jurisdiction."

In 1876, in Kerr v. Corporation of Preston, supra, which involved an attempt to restrain certain criminal proceedings, Jessel, M. R., said:

"Why ought a court of equity to interfere with the ordinary proceedings of a criminal court? I am not aware that any such power exists. The point came before me in Saul v. Browne, L. R. 10 Ch. 64, where I declined to interfere with criminal proceedings or to follow Lord Hardwicke's doubtful decision in Mayor of York v. Pilkington, 2 Atk. 302. My decision was appealed from, and the Lords Justices thought it a right decision. With the exception of that case before Lord Hardwicke, there is no instance in which a court of equity has interfered in criminal proceedings. I do not say that the court might not interfere in a possible case, but as a general rule it will not."

In Wharton's Criminal Procedure (10th Ed., vol. 3, p. 2134) it is said:

"Court of equity has no jurisdiction to stay or enjoin criminal proceedings."

In 16 Am. & Eng. Encyc. of Law, p. 363, it is laid down:

"A court of equity has no criminal jurisdiction, and cannot interfere to prevent the commission of criminal or illegal acts, unless there is some interference, actual or threatened, with property or rights of a pecuniary nature; but when there is such interference, and there is no adequate remedy

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at law, the fact that the act may be criminal will not divest the jurisdiction of equity to prevent it."

I may stop here to say that an illustration of what is meant by the passage quoted may be found in In re Debs, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092. In that case, decided in 1894, Mr. Justice Brewer, speaking for the court, said:

"A chancellor has no criminal jurisdiction. Something more than the threatened commission of an offense against the laws of the land is necessary to call into exercise the injunctive powers of the court. There must be some interferences, actual or threatened, with property or rights of a pecuniary nature; but when such interferences appear the jurisdiction of a court of equity arises, and is not destroyed by the fact that they are accompanied by or are themselves violations of the criminal law."

The court sustained the right to punish Debs for his violation of the injunction, the injunction having been issued for the protection of property. The acts which Debs committed in violating the injunction the court said might or might not have been violations of the criminal law. "If they were, that matter is for inquiry in other proceedings."

In citing the English decisions above referred to I am mindful that the Supreme Court has more than once declared that the equity jurisdiction of the courts of the United States is the same in nature and extent as the equity jurisdiction of England, from which it is derived. Dodge v. Woolsey, 18 How. 331, 347, 15 L. Ed. 401; Fenn v. Holme, 21 How. 481, 16 L. Ed. 198; Thompson v. Railroad Companies, 6 Wall. 134, 18 L. Ed. 765; Van Norden v. Morton, 99 U. S. 378, 380, 25 L. Ed. 453; Root v. Railroad Co., 105 U. S. 189, 26 L. Ed. 975.

There are many decisions in the courts of this country in which the general rule has been applied that in general the equity courts are without jurisdiction to restrain criminal proceedings. In Attorney General v. Utica Ins. Co., 2 Johns. Ch. 371, Chancellor Kent said:

"If a charge be of a criminal nature, or an offense against the public, and does not touch the enjoyment of property, it ought not to be brought within the direct jurisdiction of this court, which was intended to deal only in matters of civil right, resting on equity, or where the remedy at law was not sufficiently adequate."

The citations might be extended indefinitely, but enough has been said to show that the statements of the text-writers are abundantly sustained by the decisions of the courts as to what is the general rule as to the right to an injunction to restrain criminal proceedings.

I come now to inquire under what circumstances the Supreme Court has recognized a right to restrain criminal proceedings by injunction.

The question was before the court in 1887 in In re Sawyer, 124 U. S. 200, 8 Sup. Ct. 482, 31 L. Ed. 402. I shall not go into the facts that were before the court in that case, except to say that a bill was filed praying an injunction to restrain the mayor and council of a city from removing a city officer for malfeasance in office. The lower court granted the injunction, and committed the defendants for contempt in disregarding it. The Supreme Court held the injunction

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absolutely void, and that the order committing defendants for contempt was also void, and that defendants were entitled to their discharge on habeas corpus. In the opinion, written by Mr. Justice Gray, it is said in referring to the jurisdiction of equity:

"It has no jurisdiction over the prosecution, the punishment, or the pardon of crimes or misdemeanors, or over the appointment and removal of public officers. To assume such a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offenses, or for the removal of public officers, is to invade the domain of the courts of common law, or of the executive and administrative department of the government."

And it is also said:

"From long before the Declaration of Independence it has been settled in England that a bill to stay criminal proceedings is not within the jurisdiction of the court of chancery, whether those proceedings are by indictment or by summary process."

Again it is said:

"The modern decisions in England, by eminent equity judges, concur in holding that a court of chancery has no power to restrain criminal proceedings, unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there."

In 1898, in Fitts v. McGhee, 172 U. S. 516, 19 Sup. Ct. 269, 43 L. Ed. 535, the subject was before the court again, a suit having been brought to restrain the Governor of Alabama, the Attorney General of the state, and the solicitor of the Eleventh judicial circuit of the state, from instituting or prosecuting any indictment or criminal proceeding against any one for violating the provisions of an act of the Legislature of Alabama, prescribing certain maximum rates of toll. The court below, the cause having been discontinued as against the governor, whose term of office had expired, issued a temporary injunction on the ground that the act was unconstitutional and void, as being in violation of the Constitution of the United States. The court, in an opinion written by Mr. Justice Harlan, referred approvingly to what was held in Re Sawyer, supra. And in referring to the fact that the toll-gatherers in the plaintiff's service had been indicted in a state court for violating the provisions of the act, the court said:

"Let them appear to the indictment and defend themselves upon the ground that the state statute is repugnant to the Constitution of the United States. The state court is competent to determine the question thus raised, and is under a duty to enforce the mandates of the supreme law of the land. * * * That the defendants may be frequently indicted constitutes no reason why a federal court of equity should assume to interfere with the ordinary course of criminal procedure in a state court."

The next case I will refer to is that of Ex parte Young, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764, decided in 1908. This was an application for leave to file a petition for writs of habeas corpus and certiorari in behalf of the Attorney General of the state of Minnesota. The lower court had restrained the Attorney General from taking any steps to put in force the orders of the railroad commission of the state, and certain

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acts passed by the Legislature of the state fixing rates, and which subjected to criminal proceedings those who violated the provisions of the acts and the orders of the commission. It was claimed that the acts were unconstitutional as being confiscatory. The Attorney General had violated the injunction, was proceeded against for contempt, and was in the custody of the United States marshal. The Supreme Court held the acts unconstitutional. So that the court had before it (1) an unconstitutional act, (2) which act was the subject of inquiry in a suit already pending in a federal court, and (3) the intention of the state's Attorney General to enforce it. And it was held that under these circumstances the injunction was properly issued. But the case of In re Sawyer, supra, was neither overruled nor doubted. In the opinion, written by Justice Peckham, the court, referring to the rule that a court of equity has no jurisdiction to enjoin criminal proceedings, by indictment or otherwise, said:

"But there are exceptions. When such indictment or proceeding is brought to enforce an alleged unconstitutional statute, which is the subject-matter of inquiry in a suit already pending in a federal court, the latter court, having first obtained jurisdiction over the subject-matter, has the right, in both civil and criminal cases, to hold and maintain such jurisdiction, to the exclusion of all other courts, until its duty is fully performed."

The court also pointed out that an injunction might issue to prevent unlawful interference by criminal proceedings under a void law or ordinance, where otherwise property rights would be destroyed. The case is considered consistent with In re Sawyer, supra, which the court expressly declared "is not to the contrary."

I concur with what is said in the opinion of the court that the case now under consideration does not fall within the exceptions stated in Ex parte Young.

No cases have come under my notice in which the Supreme Court has added to the exceptions stated in the case last cited.

In 1916 the court decided Wilson v. New, 243 U. S. 332, 37 Sup. Ct. 298, 61 L. Ed. 755, L. R. A. 1917E, 938, Ann. Cas. 1918A, 1024. The suit was brought to restrain the officers of certain labor unions and a United States District Attorney from establishing an eight-hour day for interstate and foreign commerce. The act provided that any person violating it should, upon conviction, be fined not less than $100 and not more than $1,000, or imprisoned not to exceed one year, or both. The court held the act constitutional, and reversed the court below, which had granted an injunction. The case turned upon the constitutionality of the act, and there is no decision of the question as to the power of a court of equity to enjoin criminal proceedings, and no reason for supposing that the court intended it to be understood that the jurisdiction of equity in such cases was to be extended beyond the limits stated in Ex parte Young.

In 1918 Hammer v. Dagenhart, 247 U. S. 251, 38 Sup. Ct. 529, 6 L. Ed. 1101, Ann. Cas. 1918E, 724, was decided. The court below had enjoined the enforcement of an act of Congress intended to prevent interstate commerce in the products of child labor. The act provided for a criminal prosecution of those violating its provisions.

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The only question discussed in the opinion was that of the constitutionality of the statute, and, as the court held that unconstitutional, it affirmed the lower court, which enjoined its enforcement. The case added nothing to what was said in Ex parte Young upon the subject now under consideration. It was a case where property rights would have been destroyed by criminal proceedings under a void law, and therefore within the exceptions stated in Justice Peckham's opinion in the Young Case.

In Truax v. Raich, 239 U. S. 33, 36 Sup. Ct. 7, 60 L. Ed. 131, L. R. A. 1916D, 545, Ann. Cas. 1917B, 283, the act was unconstitutional and the Attorney General was restrained.

In Philadelphia Co. v. Stimson, 223 U. S. 605, 32 Sup. Ct. 340, 56 L. Ed. 570, the statute being constitutional, the bill to enjoin enforcement was dismissed.

Does the fact that the prosecuting officer misconstrues a constitutional statute justify a court of equity in issuing an injunction to restrain him? I am not aware that the Supreme Court has so held. In the absence of such a ruling I think the doctrine announced by the Circuit Court of Appeals in the Sixth Circuit should be followed. It was there said in Arbuckle v. Blackburn, 113 Fed. 623, 51 C. C. A. 129, 65 L. R. A. 864, that the jurisdiction of courts of equity had never been carried to that extent in authoritative decisions. "On the contrary," said Judge Day (afterwards Justice Day of the Supreme Court), "the Supreme Court, in more than one instance, has denied such jurisdiction." And he adds: "We think this an enlargement of the jurisdiction opposed to reason and authority." This opinion was concurred in by Judge Lurton, who also later became a member of the Supreme Court of the United States.

I concur also in the objection that to enjoin the United States attorney from proceeding under a constitutional statute is to enjoin the United States. As was said in Harkrader v. Wadley, 172 U. S. 148, 160, 170, 19 Sup. Ct. 119, 127 (43 L. Ed. 399): "In proceeding by indictment to enforce a criminal statute the state can only act by officers or attorneys, and to enjoin the latter is to enjoin the state." If the law officer of the government attempts to enforce an unconstitutional law, he is in that attempt not representing the state, and is to that extent denied his official or representative character.

In the opinion of Judge WARD, which is the opinion of the majority of the court, the injunction is allowed to stand as against the acting and deputy collector of internal revenue. In that conclusion I am unable to concur.

The bill of complaint was originally filed, not against the collector of internal revenue of the Third district, but against Mark Eisner, who at the time of the filing of the bill occupied that office. Thereafter Mr. Eisner resigned, and upon motion the defendant McElligott was made a party to the suit, he having succeeded to the office as acting and deputy collector of internal revenue. The bill is against McElligott, describing him as acting and deputy collector of internal revenue, and the injunction runs against "the said defendant McElligott." It is not necessary to inquire what the effect would be in case McElligott

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should cease to hold the office he now fills, and whether the words "acting and deputy collector of internal revenue" are anything more than a descriptio personæ, identifying the person intended to be bound, and not effective as against another who might succeed to the office upon his death or resignation. See Dillon on Municipal Corporations, vol. 4 (5th Ed.) § 1536.

The injunction restrains McElligott, his agents, servants, subordinates, and employés,

"pending final hearing and decision of this cause, and until the further order of this court, from refusing to issue to said complainant, its agents, officers, servants, and employés, or any of them, revenue stamps in respect of such beer or malt liquor, provided the taxes payable thereon by law are duly tendered or paid to him or them, and from at any time hereafter refusing to license and to permit said complainant duly to qualify as a brewer of said beer or malt liquor, if otherwise duly qualified, even though the beer or malt liquor manufactured, produced, and sold by it, or intended so to be, contain more than one-half of one per cent. of alcohol by volume, so long as it shall contain, when disposed of for consumption, not to exceed two and three-quarters per cent. (2¾ p. c.) of alcohol by weight."

The injunction also restrains him from—

"seizing, attempting or causing to be seized, or otherwise interfering with the property, business, and affairs of said complainant for or on account of any such violations of the provisions of said act of Congress of November 21, 1918, or said proclamation of the President, or said regulations, upon the ground or claim that beer or malt liquor containing not to exceed two and three-quarters per cent. (2¾ p. c.) of alcohol by weight is as matter of fact intoxicating, and that the manufacture, production, and sale of such beer or malt liquor is prohibited by the act of Congress of November 21, 1918, or by the proclamation of the President heretofore issued under and by virtue of said act of Congress of August 10, 1917, or by the regulations of the Commissioner of Internal Revenue."

McElligott is subject to the orders of the Commissioner of Internal Revenue. That official in an affidavit states that he is acting, and will continue to act, in the matters herein involved, "in conformity with the advice of the Department of Justice." He states:

"That heretofore, believing that he could not properly sell stamps for tax payments on beer illegally manufactured, and that his so doing might be construed as an act on the part of the government sanctioning an illegal act, he instructed the collector of internal revenue for the Third district of New York, and the collectors of internal revenue at Philadelphia, Pa., Syracuse, N. Y., and Newark, N. J., to refuse to sell such stamps when the beer had been manufactured subsequent to December 1, 1918. But being now advised by the Department of Justice that if such beer is actually manufactured the manufacturer is liable for the tax whether the manufacture be lawful or unlawful, although in the latter event such manufacturer will be subject to prosecution for a violation of the acts above mentioned, he has canceled said instructions, and directed said collectors to sell the stamps in order that the tax in question may be paid. And this course he intends to pursue unless it shall be decided by the courts that the same is improper.

"That this affiant, acting under advice from the Department of Justice, has instructed the collector of internal revenue for the Third district of New York, N. Y., and the collectors of internal revenue at Philadelphia, Pa., Syracuse, N. Y., and Newark, N. J., not to take the seizures of beer or seizures of any property of brewers because of violations of the provisions of the Food Control Act of August 10, 1917, or regulations issued thereunder, or for violations of the act of November 21, 1918. That this affiant is advised and be-

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lieves that the powers of seizures of beer or of the property of brewers be exercised by collectors of internal revenues only for violations or evasions of statutes relating to the payment and collection of taxes upon the manufacture and sale of beer, and that such powers of seizure do not exist because of violations of the Food Control Act of August 10, 1917, or the act of November 21, 1918, or regulations issued by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury under either of the two above-named acts."

He also states in an affidavit:

"That deponent is advised and believes, and, unless otherwise directed by the court, will act and require collectors of internal revenue to act upon the assumption that the sole penalties for such violations of section 15 of the Food Control Act of August 10, 1917, or of the rules and regulations made pursuant thereto, or of the act of November 21, 1918, are fines and imprisonments prescribed by those acts; that the penalties of seizures and forfeitures of property prescribed by the Internal Revenue Laws do not accrue because of such violations, but accrue only because of failures to comply with the Internal Revenue Laws themselves, which govern the payment and collection of taxes."

It appears that acting under instructions from the Commissioner of Internal Revenue, issued on April 11th, and revoked on or about April 21st, McElligott refused to sell internal revenue stamps to the brewers. In relation to that matter McElligott states in his affidavit:

"After the revocation of such instructions I never required such affidavit, and never refused or threatened to refuse to sell internal revenue stamps to be placed on beer or barrels of beer, and have been at all times and still am ready and willing to sell the brewers all such stamps as they may wish to purchase."

He also states:

"Affiant further says that while he held the office of collector of internal revenue of the Third district of New York, as aforesaid, he never did at any time make any threat or threats with respect to or in any manner or form as alleged in paragraph XI of the bill of complaint, or in any way or manner with respect to the matters or things therein alleged."

In view of these affidavits, I find no justification for the issuance of an injunction against McElligott. The intention to do the prohibited acts is not shown to exist, but is expressly shown not to exist.

In Real Estate Trust Co. v. Hatton, 194 Pa. 449, 45 Atl. 379, it was held that where the defendant, by answer and in open court, disclaimed any intention of doing the acts sought to be enjoined, a preliminary injunction should be denied, but that the bill would be retained, with leave to the plaintiff to apply for an injunction if the defendant disregarded his avowed intention.

Under the circumstances existing in this case, and in view of the fact that the defendant McElligott is a responsible official of the government, who disclaims any intention of doing the acts he is alleged to intend to commit, I am of the opinion that the bill should be dismissed as to him, as well as to the United States attorney, but for a different reason. As I understand, the law courts do not grant injunctions to allay fears and apprehensions without evidence that there are sufficient reasons for the fears and apprehensions which are alleged to be entertained. It must be made to appear to the court that the acts

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against which protection is asked are not only threatened, but will in all probability be committed to the injury of the complainant, who must show reasonable ground for apprehending that it will otherwise be done. 16 Am. & Eng. Encyc. 361. It is well to remember that there is no power the exercise of which is, in the opinion of the Supreme Court, more delicate than the issuing of an injunction. It is the strong arm of equity, which ought never to be extended, except in a clear case. Truly v. Wanzer, 5 How. 142, 12 L. Ed. 88.

In view of the conclusion reached that the bill should be dismissed as to the United States attorney, it is not necessary to pass upon the question as to the construction to be given to the act of Congress approved November 21, 1918. The statute provides:

"After May 1, 1919, until the conclusion of the present war, and thereafter, until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, no grains, cereals, fruit, or other food product shall be used in the manufacture or production of beer, wine, or other intoxicating malt or vinous liquor for beverage purposes. After June 30, 1919, until the conclusion of the present war, and thereafter until termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, no beer, wine, or other intoxicating malt or vinous liquor shall be sold for beverage purposes except for export."

As, however, it is desired that the judges express their opinion as to the meaning of the words, "no beer, wine or other intoxicating malt or vinous liquor," I state my opinion. It is that the rule of construction known as ejusdem generis applies. Where general words follow the enumeration of a particular class of things, the general words will be construed as applicable to things of the same class as that enumerated. The paramount duty of a court is to see that no effect shall be given to any law which violates the Constitution. After that the next duty is to see that effect is given to the legislative intent. I am unable to see any escape from the conclusion that Congress in enacting the law had in mind intoxicating liquors. In that conclusion I agree with my Associates

Whether beer containing not more than 2.75 per cent. of alcohol is intoxicating is not a question of law, but one of fact, and will be determined at the final hearing upon the merits.

The acts of Congress now under consideration contain no definition of what per cent. of alcohol makes liquor intoxicating. In a number of the states the statutes prohibit the use of all "alcoholic" liquors for beverage purposes. In a large number the standard of an intoxicating beverage is fixed at one-half of 1 per cent. And for nearly 20 years the Bureau of Internal Revenue has treated beer containing one-half of 1 per cent. or more of alcohol as a malt liquor, and the brewers of the country have acquiesced in this definition of beer. And it is not unlikely that the present Congress, in enacting a Prohibition Enforcement Bill, will undertake to define what is intoxicating liquor, and if it does may undertake to fix the standard at one-half of 1 per cent. in accordance with the rule established for so many years in the Bureau of Internal Revenue. But, in the absence of some definitive legislation, the meaning of the term "intoxicating liquors" is clearly

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left as a question of fact, and not of law, and the courts cannot undertake to say, as matter of law, that liquor which contains 2.75 per cent. of alcohol by weight is not intoxicating. And neither the opinion of my Associates, nor the opinion of the district judge, contains anything to the contrary. In the opinion of the district judge he expressly declared "that the question whether beer having 2.75 per cent. of alcohol is intoxicating" was not before him for decision.

I summarize my conclusions as follows:

1. The acts of Congress herein involved are constitutional.
2. They relate to liquors which are intoxicating.
3. Whether liquor which contains 2.75 per cent. of alcohol in weight is intoxicating is a question of fact, which will be determined as such when the case reaches final hearing, the majority of the court having decided that the bill should not be dismissed except as against the United States attorney.
4. That the bill should have been dismissed not only as against the United States attorney, but also against the acting and deputy collector of internal revenue.
5. That a United States attorney under certain circumstances may be restrained from instituting criminal proceedings under an unconstitutional law.
6. That under the circumstances existing in this case he cannot be restrained from instituting such proceedings under a constitutional law, the construction of which it is alleged he misapprehends.

HOUGH, Circuit Judge (dissenting in part). In the result reached by Judge WARD I concur, and with the opinion I agree, except in so far as it bases the modification of injunction order on a lack of "power to stay the United States attorney" from instituting any and every criminal proceeding under any constitutional statute.

The matter is one of degree, not of kind or power. A prosecuting officer's threatened act may be so preposterously unlawful (though not unconstitutional) as to justify the intervention of equity.

Injunction is always against human action, and no logical difference, either as to wrong or remedy, can be pointed out between unconstitutional human action and similar action without color of law therefor.

The wrong here complained of, however, was and is that of the Internal Revenue Department of the Treasury. Under laws in force long before 1918, every brewer (practically) brewed on sufferance of the commissioner. As July 1, 1919, approached that official threatened to refuse the licenses and stamps, without which brewing is absolutely illicit, and subjects the brewer to confiscatory proceedings and penalties of extreme severity. The plain intent was to enforce a strained construction of the act of November 21, 1918, by preventing brewers from complying with pre-existing and unrepealed law.

So far as I can now see, the injunction against the collector stops that plan, and I regard the relief obtained below against the United States attorney as in effect preventing that official from asking at the hands of a grand jury indictments for offenses created only by the act of November 21st itself.

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Such possible indictments would not involve preliminary seizure of plant and tools, and they should be left to their course at common law, except under circumstances of extreme necessity, not here shown. This dissent, then, is limited to the reason assigned for a result to which I agree.

(259 Fed. 543)

THOMAS et al. v. LUKENS.

(Circuit Court of Appeals, Fourth Circuit. April 17, 1919.)

No. 1686.

1. EJECTMENT ⟹9(3)—TITLE TO SUPPORT ACTION.
   In ejectment, plaintiff must recover on the strength of his own title, and not on the weakness of the defendant's title.
2. PUBLIC LANDS ⟹186—PATENT NOT TITLE SUPPORTING EJECTMENT AS TO LANDS PREVIOUSLY GRANTED.
   A patent to land executed by the Governor of West Virginia *held* void under the Constitution and statutes of the state, and not sufficient to support an action of ejectment, on the ground that a valid conveyance of the state's title had previously been made to another.

In Error to the District Court of the United States for the Northern District of West Virginia, at Elkins; Alston G. Dayton, Judge.

Ejectment by Edward L. Thomas and others against Charles Edward Lukens. Judgment for defendant, and plaintiffs bring error. Affirmed.

This is an action of ejectment, instituted in the United States District Court for the Northern District of West Virginia, to recover from the defendant 207 acres of land situated in Randolph county, W. Va. The 207 acres consist of two smaller tracts, one for 163, and the other for 44, acres. These two tracts are a part of original tract of 500 acres that had been conveyed by George W. Yokum, commissioner of school lands for Randolph county of that state, to George W. Harmon by deed dated October 28, 1879.

The plaintiffs base their right to recover upon a paper in the nature of a grant from Jacob B. Jackson, Governor of West Virginia, to Frederick Fickey, Jr., and Edward L. Thomas, dated October 21, 1883, in which it was recited that the grant was made by virtue of the authority of chapter 50 of the Acts of 1883, and which purports to convey 2,000 acres situated in Randolph county. The 2,000-acre tract overlaps the 500-acre tract to the extent of 207 acres, which constitutes the 207-acre tract as above stated. It is conceded that whatever title the plaintiffs have to the 2,000 acres is by will from Frederick Fickey and the descendants of Edward L. Thomas, both of whom are now dead. The issues were made up in the usual manner; the case was tried; a jury was impaneled; a large portion of the evidence was condensed by reason of stipulations entered into by plaintiffs and defendant. Plaintiffs offered in evidence a stipulation in writing, also description of patent, a survey, and the deed book from the clerk's office, Randolph county, showing the recordation of such patent. Plaintiffs then rested their case. Defendant, by counsel, moved to strike out all the plaintiffs' evidence. The court took the motion under advisement, stating that he would reserve an opinion on judgment until a later time in the trial, at which time the defendant introduced the deed of George W. Yokum, commissioner of school lands, to George Harmon, and the court proceeding on which it was based, showing that the land therein conveyed had been waste and unappropriated land. Counsel for plaintiffs admitted that these proceedings were regular, and waived introduction of same. Then defendant offered his stipulation in writing, which shows a number of deeds, so as to form a complete chain of title for such tract of land from the

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original deed by George W. Yokum, the commissioner, down to the beginning of this suit, after which defendant requested the court for a final ruling upon the motion to exclude the plaintiffs' evidence. The jury was withdrawn, and the motion argued whereupon the court sustained such motion, excluding plaintiffs' evidence, and directed a verdict for the defendant.

E. D. Talbott, of Elkins, W. Va. (Talbott & Hoover, of Elkins, W. Va., on the brief), for plaintiffs in error.

C. O. Strieby, of Elkins, W. Va., for defendant in error.

Before PRITCHARD and KNAPP, Circuit Judges, and ROSE, District Judge.

PRITCHARD, Circuit Judge (after stating the facts as above). [1] It is a well-settled rule that a plaintiff in a suit of this character is required to recover on the strength of his own title. In other words, he cannot rely upon the weakness of defendant's title, and until he shows a legal title to the land involved he is not entitled to recover. In Reusens v. Lawson, 91 Va. 226, 21 S. E. 347, it is held:

"In an action of ejectment the plaintiff must recover on the strength of his own title, and if it appear that the legal title is in another, whether that other be the defendant, the commonwealth, or some third person, it is sufficient to defeat the plaintiff."

[2] Counsel for defendant insist that the plaintiffs' grant is void upon the ground that, at the time same was issued, the title had passed from the state by virtue of the land commissioner's sale, and was then vested in the defendant. It was incumbent upon the plaintiffs as a first step in the proceeding to show they derived title from the state, and this they did not do, inasmuch as the title, as we have said, had passed from the state to the defendant by virtue of the land sale. The learned judge who heard this case in the court below, among other things, in referring to the questions involved, said:

"At the beginning of this trial, when the plaintiffs offered in evidence a copy of the grant to Fickey and Thomas, dated the 31st day of October, 1883, the defendant objected to the admission thereof, substantially for three reasons: First—because the copy tendered was not properly verified. Second—because such grant had been issued without legal authority and in contravention of article 13, § 4, of the Constitution of the state; the legislative act of the 22d day of February, 1883, by authority of which such grant purports to have issued, being unconstitutional. Third—that the issuance of such grant was limited by an exception of such legislative act, set forth at the end thereof, to the effect that no grant made under it would affect any title derived from sale made by a court of school lands of waste, unappropriated, or forfeited lands; that in 1879, three years before, the commissioner of school lands had, in regular judicial proceedings, sold the land in controversy to George Harmon, under whom, by mesne conveyances, the defendant now holds title and possession; that therefore this act of 1883, if constitutional, by reason of this exception embodied in it, did not authorize the issuance of this grant and it was and is therefore void. * * *

"On the other hand, plaintiffs, while admitting possession of the land to be in defendant, tender to show by legal evidence that his title under his school commissioner deed of 1879 has become forfeited under chapter 105 of the Code, by reason of the omission of the land from the land books and nonassessment of taxes thereon for five consecutive years, by reason whereof, it is insisted, defendant's older title has become vested in them by reason of their junior title under the grant and by devise and inheritance.

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"As I view the matter, the crucial question for me first to determine is the legality of the 1883 grant or patent to Fickey and Thomas, the foundation of plaintiffs' claim of title. While it may be pure dicta in the case, I am convinced that Judge Brannon's discussion of the purpose, intent and effect of the constitutional provisions contained in article 9, § 2, of the Constitution of 1863, and article 13, §§ 2, 4, of the present (1872) Constitution of the state, set forth in State v. Harman, 57 W. Va. 447, at page 460, 50 S. E. 828, is entirely correct in fact and conclusion—that is to say: That both of these provisions were enacted to change in toto the old Virginia system by warrant, entry, survey, and grant, for the disposition of waste, unappropriated, and forfeited lands vested in the state, and substitute therefor a system by which, through the intervention of judicial proceedings, a sale thereof would be required, the proceeds thereof to go to the state school fund; that while the constitutional provision of 1863 made an exception in favor of entries made prior to 1863, the article of the 1872 (present) Constitution, by reason of its omission of this exception and by virtue of its other provisions exclusive in effect, made this judicial sale method the sole and only way by which these waste, unappropriated, and forfeited lands, vested in the state, could thereafter be disposed of, and finally and completely negatived all right or power on the part of the Legislature to provide for their disposition by grant or otherwise. * * *

"However, it seems to me very clear that under the exception and limitation contained in this act that at the time this patent issued in 1883 the Governor of the state was without power or authority to act in the premises, and its issue was wholly illegal, and the grant itself must be held therefore null and void, and this for the reason that the land had been sold in 1879 in regular judicial proceedings by the school commissioner, and by him conveyed to Harmon, the purchaser, and was not, therefore, subject to grant under the terms and intent of the act.

"This sale and conveyance, thus provided for by the Constitution, it has been well settled in this state, constituted such deed in effect a substantial new grant of title from the state itself, and entitled the purchaser to have the land assessed in his own name, regardless of any delinquencies on the part of any former owner in the matter of assessment and payment of taxes, and entirely cut off any such former owner's right of redemption; and such title so vested in the purchaser could not be forfeited until he had thereafter allowed it to be omitted from the land books and nonassessed with taxes for five consecutive years. No such forfeiture had or could have accrued at that time, 1883, when the Governor attempted to make this grant, for only three assessment years had intervened since the purchaser, Harmon, had obtained his title from the school commissioner proceeding; and this act of 1883 could not under its exception be made applicable to affect this land after it has been the subject of such judicial sale in school commissioner proceedings.

"The ultra vires act of the Governor in issuing the grant rendering it void ab initio, its validity could not be subsequently established by any delinquency of Harmon or his subsequent grantees in allowing his good title to become forfeited. If he or they did so allow it to be forfeited, the land thereby again vested in the state, to be again sold under another school commissioner proceeding, unless the state should elect to allow him or them to redeem by payment of taxes, damages, and costs. This right to redeem the state could elect to refuse, but in practice in this state it is always allowed. I therefore conclude that Fickey and Thomas, in 1883, could not and did not secure either title or color of title, by reason of constitutional inhibition and the limitation in the act of 1883, and that the grant seeking to give them title was entirely null and void. The plaintiffs here are the heirs at law and trustees of these two men; they can recover only on the strength of their own title, and not upon the weakness of the defendant's. They have no other paper writing, from any one, upon which to base a claim of color of title, and if this grant, although void for the purpose of securing legal title, should be held nevertheless sufficient to confer upon them color of title, such color of title can avail them nothing, unless accompanied with proof of ten years open, notorious, exclusive, and adverse possession under the law of this state. Such evidence of possession they admit cannot be produced by them. This being so,

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it would be clear error to allow them to assail defendant's title by showing it to be forfeited, and it becomes unnecessary to protract the trial by either permitting or requiring the defendant to introduce evidence as to his possession. The plaintiffs cannot recover, because they have no legal title to the land and no color of title supported by the required possession. This being true, the defendant need prove nothing as to his title."

The foregoing is a fair statement of the contentions of the parties, and we think the legal conclusions based thereon are correct. Therefore we do not deem it necessary to enter into an extended discussion of the questions involved, other than to say that we have carefully considered the cases relied upon by defendant, but are of the opinion that they do not apply to the case at bar.

A careful consideration of the provisions of the Constitution of West Virginia relating to land, and the statutes passed in pursuance thereof, clearly show, as we have stated, that at the date of the issuance of the grant the state did not possess title to this land.

For the reasons stated, judgment of the lower court is affirmed.

Affirmed.

(259 Fed. 546)

RAINBOLT v. LAMSON BROS. et al.

(Circuit Court of Appeals, Eighth Circuit. May 28, 1919.)

No. 5253.

1. **CARRIERS ⟹59—BILLS OF LADING—RIGHTS OF TRANSFEREE.**

   A bill of lading for a car of grain, stamped on its face, "Receipt issued for this bill of lading under rules of Omaha Grain Exchange," *held* to charge a transferee, who was a member of the exchange, with notice that, as provided in such rules, title to the grain remained in the holder of the receipt until he was paid therefor.

2. **CARRIERS ⟹55—BILLS OF LADING—NEGOTIABILITY.**

   A notation on a bill of lading for a car of grain, which rendered it nonnegotiable, *held* not invalidated under Act Aug. 29, 1916, § 3 (Comp. St. § 8604b), by a subsequent rebilling of the car in interstate commerce without the knowledge of the legal owner of the grain.

In Error to the District Court of the United States for the District of Nebraska; Joseph W. Woodrough, Judge.

Action by Carroll S. Rainbolt, doing business as the Rainbolt Corn Company, against Lamson Bros. and others. Judgment for defendants, and plaintiff brings error. Reversed.

Frank H. Gaines, of Omaha, Neb. (McGilton, Gaines & Smith, of Omaha, Neb., on the brief), for plaintiff in error.

Francis A. Brogan, of Omaha, Neb. (Alfred G. Ellick, of Omaha, Neb., on the brief), for defendants in error.

Before HOOK and STONE, Circuit Judges, and MUNGER, District Judge.

STONE, Circuit Judge. The facts pleaded and proven are as follows:

The plaintiff, doing business under the trade name "Rainbolt Corn Company," purchased a carload of corn in Omaha from the Farmers'

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Grain & Supply Company, the grain having been shipped from Merna, Neb., on the Chicago, Burlington & Quincy Railroad, to Omaha. The bill of lading representing the corn was sent to a bank in Omaha with draft attached, and upon payment of the draft Rainbolt obtained possession of the bill of lading. The car of grain was then sold by the plaintiff to the U. S. Commission Co. (a trade-name for W. R. Richter) on the floor of the Omaha Grain Exchange, both Richter and Rainbolt being members of the Grain Exchange, which is a corporation. Rainbolt indorsed the bill of lading on the back and stamped on the face these words:

"Receipt issued for this bill of lading under rules of Omaha Grain Exchange to Rainbolt Corn Company."

The bill of lading, thus indorsed and stamped, was then delivered to Richter. The receipt called for on the bill of lading is as follows:

"Received of Rainbolt Corn Company, of Omaha, Nebr., bill of lading, executed by the C., B. & Q., dated at Merna, Nebraska, covering a car of corn, for which the undersigned agrees to pay to Rainbolt Corn Company the sum of $2.28 per bushel within six days from the date hereof, or, if not unloaded, will advance 75 per cent. of the value upon surrender of this receipt. Said bill of lading describes said car as No. 114217, initials C. B. & Q., capacity ——— lbs.

"It is agreed by us that the title to said bill of lading and contents of said car shall remain in the Rainbolt Corn Company, or their assigns, until the undersigned has paid Rainbolt Corn Company, or their order, the entire purchase price of said grain at said rate. Upon full payment to Rainbolt Corn Company, or order, of said purchase price as aforesaid, and the surrender of this receipt, the title to said bill of lading and contents of said car shall pass to the undersigned. [Signed] U. S. Commission Co."

The rule of the Grain Exchange covering receipts of this character is as follows:

"Where a bill of lading is transferred, and the party receiving the same issues and delivers to the person surrendering the bill of lading a receipt therefor, stating that the title to the grain covered by said bill of lading shall remain in the party holding said receipt until the same is fully paid for, then the person issuing such receipt is hereby prohibited from accepting or receiving advances on said bill of lading, or negotiating the same, so long as the receipt therefor is outstanding.

"Where a bill of lading is transferred and receipt issued therefor as above provided, the party transferring the same shall plainly stamp or write across the face of said bill of lading the words: 'Receipt issued for this bill of lading under rules of Omaha Grain Exchange to [Name of Holder of Receipt.]' "

Richter took the bill of lading to the Burlington Railroad and had the car shipped to Chicago, Ill., under reconsignment permitted by the tariffs and rates of the railway. To carry out the reconsignment arrangement the railway agent at Omaha drew lines through the consignor, consignee, origin, and destination points as shown by the bill of lading and inserted:

"Order U. S. Commission Co., Chicago, Ill. Notify Lamson Bros. Co., Chicago, Ill."

Richter caused the bill of lading to be sent to a Chicago bank, attached to a draft. This draft was paid by Lamson Bros. Company, they received the carload of grain on the bill of lading and convert-

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ed it to their own use. Lamson Bros. & Co. maintained an office in Omaha and held a membership in the Omaha Grain Exchange, the same being carried in the name of C. E. Hunter, an employé of the firm who had charge of the Omaha office. Shortly after the sale by Lamson Bros., Richter, being insolvent, absconded. No payment was made to Rainbolt Corn Company or the plaintiff for the grain in controversy.

The answer was based upon two propositions: First, that defendants were purchasers in good faith for value without notice of the agreement contained in the receipt issued to the Rainbolt Corn Company; and, second, that the shipment to Chicago being interstate, and therefore governed by national statutes, "that restrictions attempted to be placed upon the negotiability of the said bill of lading after its reissue by the railroad company as aforesaid, and any rules of the Omaha Grain Exchange attempting to limit the negotiability of the said bill of lading are each and all void and of no effect." From judgment upon a directed verdict, plaintiff brings the case here.

[1] Defendant claims that it had no notice, except such as might be credited to the stamp on the face of the bill of lading, that "receipt issued for this bill of lading under rules of the Omaha Grain Exchange to Rainbolt Corn Company," and that such constituted no notice. The testimony is clear that they had no other notice or information than that given by the face of the bill of lading. Was this, under all the attendant circumstances, any or sufficient notice? An inspection of a photographic copy of the bill of lading defeats defendants' contention that the above notation on the bill was so blurred and covered by other indorsements as to be illegible. There is no dispute that it was there when they received it upon payment of the draft to which it was attached. They are chargeable with whatever, if any, notice the notation would carry to them. In the uninitiated this unusual notation would arouse attention. To such as were initiated it would be ample notice as to how the grain was held, and put them upon inquiry as to whether the receipt were still outstanding. Defendants belong to the latter class. They had a branch office at Omaha; they had a membership on the Omaha Grain Exchange, and dealt thereon through this membership. They cannot be heard to plead ignorance of the rules under which members operated. With such knowledge the meaning of the notation would have been as clear to them as to the man who placed it there. We entertain no doubt as to the sufficiency of the notice. The existence of notice takes them from under the protection of the Nebraska statute (Rev. Stat. Neb. 1913, par. 2636) governing conditional sales—even if this be deemed a conditional sale.

[2] Defendants' second contention that the Pomerene Act of August 29, 1916, c. 415, § 3, 39 Stat. 539 (Comp. St. § 8604b), would prevent this notice on the bill from being operative because it would be a restriction upon the negotiability of an interstate bill of lading, is unsound under this record. Here the overwhelming proof is that the notation was on the bill before it was made an interstate bill without the knowledge or consent of the party intended to be protected by that notation. Plaintiff swore positively that he had placed it on the bill

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of lading before he delivered the bill to Richter. An officer of the bank which made the draft on Chicago with this bill, and whose duty it was to examine such drafts and bills of lading, thought it was not there at that time; but he admitted he had no independent recollection of this particular bill of lading. It is also certain that when the bill was taken from the Chicago bank the notation was on it. The railway clerk at Omaha, who changed the bill of lading for the shipment to Chicago, said regarding the notation, "I did not pay any attention, and don't know whether I noticed it or not." The very most that might be said for defendants upon this evidence is that it presented a question of fact, but in our judgment the substantial evidence is all one way.

The act of the railway or others in changing this bill of lading to cover an interstate shipment after the notation was thereon cannot affect the force of that notation, and thus destroy, without their knowledge and consent, the rights of those protected thereby.

The judgment is reversed, with instructions to proceed in accordance with this opinion.

(259 Fed. 549)

SMITH-WEBSTER CO. v. JOHN et al.

(Circuit Court of Appeals, Third Circuit. July 3, 1919.)

No. 2461.

1. BROKERS ⟹96—PAYMENT TO BROKER—RECOVERY BY PRINCIPAL.
   If buyers, by virtue of stipulation in contract that goods were to be billed by and proceeds collected by plaintiff broker for seller, had paid plaintiff the money due seller for goods delivered, the latter could not thereafter demand it.

2. ACTION ⟹16—NATURE OF REMEDY.
   An "action" is a lawful demand of one's right in a court of justice.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Action.]

3. BROKERS ⟹106—SALES—BREACH—ACTION—PARTIES.
   Clause in contract that goods were to be billed by and proceeds collected by plaintiff broker for seller did not vest in plaintiff the right in its own right to sue for the purchase price.

4. COURTS ⟹328(4)—FEDERAL COURTS—JURISDICTION—AMOUNT.
   If contracts confer no rights on plaintiff broker to recover in its own right for breach, and the real plaintiffs are the three individuals named, the individual rights, each of which is less than the jurisdictional requirement, cannot be lumped together to create a case for federal jurisdiction.

In Error to the District Court of the United States for the Western District of Pennsylvania; W. H. Seward Thomson, Judge.

Suit by the Smith-Webster Company against Simon John and others, partners trading as Simon John & Bros. From a judgment for plaintiff for less than the amount of its claim, plaintiff brings error. Reversed and remanded, with instructions.

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Philip H. Close and S. A. Williams, both of Bel Air, Md. (Donald Thompson and George H. Calvert, both of Pittsburgh, Pa., of counsel), for plaintiff in error.

Thomas F. Garrahan, J. A. Langfitt, and H. W. McIntosh, all of Pittsburgh, Pa., and L. B. Brownfield, of Uniontown, Pa., for defendants in error.

Before BUFFINGTON, WOOLLEY, and HAIGHT, Circuit Judges.

BUFFINGTON, Circuit Judge. In this case the Smith-Webster Company, a corporate citizen of Delaware, brought suit against Simon John, William John, and Frank John, partners doing business as Simon John & Bros., citizens of Pennsylvania. The jurisdiction of the court below depends on diversity of citizenship, and the fact that the amount in issue between said parties amounts to $3,000.

A consideration of this case satisfies us that, while the necessary diversity of citizenship exists to vest jurisdiction, there is no issue between the said parties which involves $3,000. As the court below, therefore, was without jurisdiction, it follows that the judgment entered therein in favor of the plaintiff for $1,119.13 must be reversed, and the cause remanded, with instructions to dismiss the case, without prejudice, for lack of jurisdiction. Without entering into a full discussion of its facts and the course the case took on the trial, we confine our discussion to those features alone which are pertinent to the conclusion we have reached that the court below was without jurisdiction.

The present suit is an action of assumpsit, which, under the Pennsylvania Procedure Act of 1887,[1] which is followed in the court below, is confined to actions on contracts, express or implied. Now, the statement of claim filed by the Smith-Webster Company neither alleges that any contract existed between it and the defendants nor that it bases its right of action upon any promise or understanding, express or implied, as to which the defendants contracted with the plaintiff. But in the absence of such contract, or contract relations between it and the defendants, the plaintiff asserts a right on its part to maintain an action of assumpsit against the defendants, because the defendants on May 31, 1917, entered into a written contract with one F. Nelson Smith, wherein was the provision:

"It is agreed and understood by the parties hereto that the goods covered by this contract are to be billed by the Smith-Webster Company, of Bel Air, Md., and proceeds collected by said company for account of the seller."

Now, it will be observed that Smith, who it is alleged contracted with the defendants, is not an actor or use party in this suit. There is no evidence that he authorized it or indeed knew this suit had been brought, but the alleged right of action of the Smith-Webster Com-

[1] "So far as relates to procedure, the distinctions heretofore existing between actions ex contractu be abolished, and * * * all demands, heretofore recoverable in debt, assumpsit or covenant, shall hereafter be sued and recovered in one form of action, to be called an 'action of assumpsit.'" P. L. 271, § 1.

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pany is, so far as Smith is concerned, based solely on this clause in the contract.

[1] Now, as appears by the Smith contract, a copy of which is filed with the statement and is printed in the margin,[2] the Smith-Webster Company, acting and signing it as brokers for F. Nelson Smith, on May 31, 1917, made a contract between the defendants and Smith for the sale of certain canned goods by said Smith to the defendants. The statement further alleges that on September 20, 1917, Smith delivered to defendants the goods contracted for, in value $1,440, and this suit seeks to recover said amount. There is no proof or allegation that the plaintiff has any interest, financial or otherwise, in this contract, or in the money sued for or to be recovered in this case. Of course, if the defendants, by virtue of this stipulation in the contract, had paid the broker the money due Smith for the goods he delivered, the latter could not thereafter demand it. But because such payment, if made, would bind Smith, it by no means follows that such clause, in case the money was not paid—which is the fact here—vested a right of action in the Smith-Webster Company, who are not shown or alleged to have any financial interest in the contract, or any right to share in the money recovered in a suit thereon. Indeed, far from this clause embodying any power to maintain this suit, to exercise that absolute control of an action, and the ownership of the money recovered therein, matters which are incident to a suitor vested with a right of action, this clause expressly provides that the "proceeds collected by said company" (Smith-Webster Company) are "for account of the seller," Smith.

[2] It is a fundamental law that an action is a lawful demand of one's right in a court of justice. Now, what legal right did this

[2] Broker's Canned Foods Contract.

Smith-Webster Company,

Brokers and Commission Merchants.

Bel Air, Md., May 31, 1917.

Sold (subject to the terms and conditions on the reverse side hereof) to Simon John & Bros., Uniontown, Pa., for account of F. Nelson Smith.

Delivered f. o. b. Bel Camp, Md., B. & O. R. R., with 300 c/s 3's from F. W. Smith.

Shipment during packing season of 1917

Cases.	Goods.	Price per Dozen.
600	No. 2 Standard Tomatoes, packing of 1917, sanitary cans, "Scotland" brand, at..... B & C	$1.20

(Should the packer of the goods covered by this contract be prevented by war conditions from securing the necessary raw stock, cans, canning supplies, or labor, the packer's liability hereunder ceases.)

Smith-Webster Company, Brokers,
By Webster.

"Terms and Conditions of This Contract of Sale.

* * * * * * * * * *

"14. It is agreed and understood by the parties hereto that the goods covered by this contract are to be billed by the Smith-Webster Company, of Bel Air, Md., and proceeds collected by said company for account of the seller."

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clause vest in this broker firm? Did that clause extinguish the right of F. Nelson Smith to sue on this contract? If it did not, did it also vest a right of action in the Smith-Webster Company? Was its purpose to subject a defendant to two separate and independent actions based on a single and indivisible right for a single breach of his contract? To effect such a result, its terms should expressly so state.

But, assuming, for present purposes, the clause in question transferred Smith's right of action for its breach to the Smith-Webster Company, such transferred right of Smith cannot be maintained in the court below, because the claim of Smith was for but $1,400. But this inadequate jurisdictional claim the plaintiff seeks to increase to the jurisdictional sum of $3,000 by adding thereto the transferred right of action of one F. W. Smith and one G. W. Gosweiler, who also had contracts of a similar character with the defendants. So far as the pleadings show, the plaintiff does not allege any relation or interdependence of said three contracts, but simply avers a right of action—

"in accordance with section 14 of each of the contracts above mentioned, for account of the several sellers."

[3, 4] If this summary, or the statement as a whole, is the assertion of a right of action vested in the Smith-Webster Company upon all of said contracts, the answer is that clause 14 does not vest a right of action in that company to sue for its breach. On the other hand, if the section confers no such right of action on the Smith-Webster Company to recover in its own right for such breach of the three contracts, but that in truth and in fact the real plaintiffs are the three individuals named, then these individual rights, each of which was less than the jurisdictional requirement, cannot be lumped together to create a case for federal jurisdiction. Treating the case, therefore, as the statement alleges, as a suit brought "for account of the several sellers," none of whose claims equal the jurisdictional requirement, we hold the case is not one for federal jurisdiction, and we are constrained to take the action noted in the beginning of this opinion.

(259 Fed. 552)

FORD v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. May 13, 1919.)

No. 5179.

1. CRIMINAL LAW ⟹1186(1)—EVIDENCE—TESTIMONY GIVEN UNDER DURESS.
   Where testimony vital to conviction is given under duress, no conviction based thereon will be permitted to stand.
2. CRIMINAL LAW ⟹369(6)—EVIDENCE—SEPARATE OFFENSE.
   In a prosecution for unlawful introduction of liquor into a state, evidence tending to show that defendant was also concerned in another attempted introduction of liquor on the same night *held* inadmissible.

In Error to the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Criminal prosecution by the United States against Tom Ford. Judgment of conviction, and defendant brings error. Reversed.

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Guy H. Sigler, of Ardmore, Okl., for plaintiff in error.

C. W. Miller, Sp. Asst. U. S. Atty., of Muskogee, Okl. (W. P. McGinnis, U. S. Atty., of Muskogee, Okl., on the brief), for the United States.

Before SANBORN and STONE, Circuit Judges, and TRIEBER, District Judge.

STONE, Circuit Judge. Writ of error from conviction for introducing liquor into Oklahoma. The conviction is challenged upon three grounds: Insufficiency of evidence; wrongful admission of evidence concerning a wagon loaded with whisky; and the claim that the charge to the jury placed the burden of proof upon the defendant, or did not require the jury to be convinced beyond a reasonable doubt of his guilt.

The uncontradicted evidence is as follows: Ford resided in Ardmore, Okl., about 28 miles from Tuck's Ferry across Red river. Early on May 18, 1917, he had crossed with an automobile at this ferry into Texas. Shortly after midnight he was ferried back to the Oklahoma shore, his car remaining there for about an hour and a half, while he and the ferryman, Henry Tuck, went a short distance up the river, where they procured several fish. He then proceeded toward Ardmore, until arrested a short distance from the ferry. Two pints of whisky, six bottles of beer, and some fish were found in the car at the time of arrest. The real issue of fact in the case was whether the liquor thus found in the car had been brought across the ferry from Texas, or whether it had been procured from a fisherman on the Oklahoma side of the river when defendant went for the fish. Defendant swore he had bought the liquor from the fisherman. Tuck swore that no liquor had been so purchased. Such contradictory testimony might sustain a verdict either way.

[1] We are asked, however, to consider in this connection a matter of considerable gravity. Defendant urges that the damaging testimony of Tuck cannot be accepted, because his evidence was given under duress. The witness Tuck testified that he had tried "the best you could" to help out defendant; that he had borrowed money from defendant; that he had told counsel for defendant the morning of the trial that the liquor had been bought from the fisherman; that he had told the marshal later that day the same thing; that he had been then arrested and put in jail by a deputy marshal; that he supposed the cause of his arrest was for telling the marshal that the liquor had been so bought; that such was not the fact; that defendant had offered him money to swear that it was so bought; that he had agreed to the bribe. He was then asked, by counsel for defendant:

"Q. If the United States marshal had not arrested you and put you in jail, would you go on the witness stand and have sworn what you told me this morning? A. No; I guess not."

The deputy marshal testified, in cross-examination by defendant, as follows:

"Q. Now, isn't it a fact that since Mr. Tuck has come here to this trial that you have discovered that Mr. Tuck wasn't testifying like you wanted him to,

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and that you have had him arrested? A. I discovered that he wasn't testifying as to what he told me the morning I arrested Ford.

"Q. Then you had him arrested for the purpose of forcing him to testify in this case favorably to the government? A. Not for the purpose of forcing him; had him arrested.

"Q. What was it that you had him arrested for, Mr. Hignight? A. Because he didn't tell me as he told me that morning, me and Mr. Smith.

"Q. In other words, you had him arrested because he didn't tell you out there in the marshal's office the same story that he told you and Mr. Smith down there at the ferry? A. Yes, sir.

"Q. That is the charge you filed against him? A. Yes, sir.

"Q. And had him put in jail? A. Yes, sir.

"Q. He wasn't under oath when he talked to you the other time was he? A. No, sir.

"Q. What did you charge him with? A. Introducing whisky.

"Q. Introducing whisky? A. Yes, sir.

"Q. You filed that charge of introducing whisky against him to force him to testify here to-day, didn't you? A. Not to force him; no, sir.

"The Court: Q. Did you believe, Mr. Hignight, from the statement that he made to you now, that, if that statement was true, he was guilty of introducing liquor himself? A. The one that he told me to-day; yes, sir.

"Q. And when he told you that story, you filed a charge of introducing against him? A. Yes, sir; on recommendation of the attorney.

"Mr. Sigler: Q. Is that the reason you filed that charge of introducing, because of what he told you here to-day? A. Yes, sir.

"Q. Well, you knew all the facts of the case when he told you down there a year ago, didn't you? A. I didn't know the facts what he told you with reference to the signal the man with the car was to give the man that had the load of whisky.

"Q. Well, if he had come here now and testified what he told you a year ago, you wouldn't have filed that charge of introducing against him, would you? A. If he told me like he did at the start; no, sir.

"Q. The reason, then, that you filed the charge against him was because he didn't tell you to-day what he told you a year ago? A. Yes, sir; what he told me that morning."

Defendant's counsel challenges denial of the statement that, immediately after giving his testimony herein, Tuck was released from imprisonment and the charge against him dismissed. The brief of the government is silent as to this entire matter. Thus is apparently presented the spectacle of the witness being bribed by the accused to tell one story, and being held under arrest by the government to force him to tell a different one. It is evident that the motive prompting accused and the motive of the government officials were very different, but the act of each was improper. Each effectually interfered with the ascertainment of truth and the due administration of justice. It is not a question of whether Tuck's testimony, as given, was true or false, but of what would have been his testimony. Where testimony vital to conviction is given under duress, no conviction based thereon will be permitted to stand. We do not say that the evidence of guilt of defendant was of itself insufficient, but we do say that, given under the circumstances here shown, it was in this trial insufficient, and the case must be retried under conditions which will remove this objection.

[2] The second point presented is that certain evidence was improperly admitted. This evidence was that an empty wagon had crossed the ferry from the Oklahoma side early that night, and about 2 o'clock had returned, loaded with whisky, had been taken part way across

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on the ferry, and then taken back to the Texas side, where it was shortly after seized by the officers; that the driver said he was waiting for a light signal to be given from the Oklahoma side, and desired to be taken back because he had not received the signal while on the boat. The signal could have been given from or near the road along which defendant intended to travel. All of this testimony strongly suggested that the defendant was connected with this intended unlawful introduction of the wagon load of whisky. While that would have been the same character of crime covered by this indictment for introducing the liquor found in the automobile, there was no attempt to connect the two. The danger of this kind of evidence is that it is likely to lead the jury aside from the case on trial, confuse the issues, and result in a conviction for acts not included in the indictment. We think the evidence was inadmissible.

The third point relates to the instruction of the court. That part of the instruction referring to the wagon load of whisky would, of course, be eliminated on retrial. The claim that the instruction took from the defendant the benefit of the presumption of innocence, and virtually shifted the burden of proof from the government, is not well taken.

For retrial, in accordance with this opinion, the judgment is reversed.

(259 Fed. 555)

OREGON-WASHINGTON R. & NAV. CO. v. BRANHAM.

(Circuit Court of Appeals, Ninth Circuit. August 4, 1919.)

No. 3322.

1. BRIDGES ⟹39(5)—UNSAFE CONDITION—LIABILITY OF INDEPENDENT CONTRACTOR.

   An independent contractor for repairing a city bridge is liable for an injury to a person crossing the bridge, caused by his negligence in leaving it in an unsafe condition.

2. DAMAGES ⟹163(1)—PERSONAL INJURY—NECESSITY OF PROOF AS TO DAMAGES.

   To entitle plaintiff in an action for personal injury to compensatory damages for loss of time, there must be evidence of his earning capacity.

In Error to the District Court of the United States for the Northern Division of the Eastern District of Washington; Frank H. Rudkin, Judge.

Action at law by A. D. Branham against the Oregon-Washington Railroad & Navigation Company. Judgment for plaintiff, and defendant brings error. Reversed.

A. C. Spencer, of Portland, Or., and Hamblen & Gilbert, of Spokane, Wash., for plaintiff in error.

Plummer & Lavin, of Spokane, Wash., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

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HUNT, Circuit Judge. The defendant in error recovered verdict and judgment for personal injury, and the plaintiff in error asks review.

In Pullman, Wash., the tracks of the plaintiff railroad company cross Kamiaken street at right angles. The Palouse river runs parallel with the railroad company's right of way, and Kamiaken street runs north and south over the river upon a bridge; the end of the bridge being adjacent to the right of way of the railroad company. The bridge had a driveway through the center and sidewalks on either side. The city of Pullman made a contract with the railroad company for the repair of the bridge. The railroad company was prosecuting the work, but before February 4, 1916, temporarily suspended on account of bad weather, and placed a plank walk, which was much used by pedestrians, from the south approach to the bridge, extending northerly to a point where the sidewalk was intact on the north end. The planks were covered with hard snow at the time of the accident to the plaintiff below.

On the evening of the 4th of February, 1916, after dark, Mrs. Branham, in walking to the city, went upon the plank walk to cross the bridge, and had gone a few steps when her foot slipped into a hole or crack, and her ankle joint was fractured. She testified that when she started to walk across there was nothing to indicate that there was any crack between the boards, or any hole to fall into. There was a barrier across the driveway, but there was a conflict as to whether the barrier extended from the end of the driveway and over the walkway far enough to warn pedestrians to keep off the walk. Mrs. Branham testified that she "swung around" the barrier and walked on the planks, and another witness said that the barrier did not make it necessary to get off the sidewalk at all before reaching the planks, and that the openings were left for foot passengers as they had been before, and that the way was commonly used. The court submitted to the jury the question whether or not there was a sufficient barrier to warn the public against the use of the walk, and charged that if there was a sufficient barrier the railroad company would not be responsible.

[1] It is said that the court erred because, under the contract of repair, the duty of keeping the bridge closed to traffic during the period of construction was imposed upon the city of Pullman; but, as it was clear that the railroad company was an independent contractor, it cannot avoid liability for injuries sustained to a third person, where such injuries have been inflicted because of conditions brought about by its negligent action. Hunter v. Montesano, 60 Wash. 489, 111 Pac. 571, Ann. Cas. 1912B, 955, cited by the plaintiff in error, is not applicable, for in that case the evidence conclusively showed that there were sufficient barriers to warn the pedestrians of the danger, and that the injured man knew of the dangerous condition of the street, while here the verdict of the jury is founded upon evidence that there was no barrier sufficient to warn the public not to use the way.

[2] Plaintiff in error contends that the court erred in instructing as follows:

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"If you find for the plaintiff, it will be incumbent upon you to insert the amount of her recovery. You will compensate her for any loss which she has sustained through impairment of her earning capacity in the past, although I believe that there is no testimony before you as to what her earning capacity was. These items will make up the amount of your verdict, in the event that you find for the plaintiff."

The ground of the exception was that there was no evidence of what was the earning capacity of Mrs. Branham. No other instruction upon the subject of the measure of damages was given, and the record shows that the court was correct in the belief that there was no testimony before the jury as to what the earning capacity of Mrs. Branham was. The question, therefore, comes to this: There being evidence that plaintiff was a dressmaker at the time of her injury and dependent upon that pursuit as a livelihood, and that because of her injuries she had not been able to carry on her business since her injury, and would not be able to use her foot freely upon a sewing machine for some time to come, was the court in error in submitting to the jury the question of damage to the general impairment of plaintiff's earning capacity? Obviously she was entitled to nominal damages therefor. But as the amount of such damage was susceptible of some proof, and none was produced, the case is brought within the general rule that the amount should not have been left to the conjecture of the jury. In Leeds v. Metropolitan Gas Light Co., 90 N. Y. 26, the Court of Appeals of New York spoke of the element of damage which consisted of lost time as purely a pecuniary loss or injury, and said:

"The rule of recovery is compensation. Where the loss is pecuniary, and is present and actual, and can be measured, but no evidence is given showing its extent, or from which it can be inferred, the jury can allow nominal damages only. * * * Where actual pecuniary damages are sought, some evidence must be given, showing their existence and extent. If that is not done, the jury cannot indulge in an arbitrary estimate of their own."

See Baker v. Manhattan Ry. Co., 118 N. Y. 533, 23 N. E. 885; Sutherland on Damages, § 1248; Joyce on Damages, §§ 227, 228; Sedgwick on Damages, § 171.

The judgment is reversed, and the cause remanded, with directions to grant a new trial.

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(259 Fed. 558)

PENNY v. ALLIANCE TRUST CO. et al.

(Circuit Court of Appeals, Eighth Circuit. May 13, 1919.)

No. 5201.

1. GUARDIAN AND WARD ⟹81—SALE OF LANDS—JURISDICTION OF COURT.
The probate court of Oklahoma had jurisdiction to order a sale of land belonging to a minor Choctaw Indian, and the circumstance that the Indian's guardian intended to take property instead of cash for the land, though known to the court, if a violation of the guardian's duty, was not a matter affecting the jurisdiction of the court to make the order of sale and an order confirming it, which orders were not void, but at most voidable.

2. GUARDIAN AND WARD ⟹108—SALE OF LAND—INNOCENT PURCHASER.
Even where orders of the probate court, for sale of a minor Choctaw Indian's land by his guardian, and confirming sale, are voidable, such action will not be taken to the prejudice of an innocent purchaser for value.

3. GUARDIAN AND WARD ⟹105(1)—PREJUDICE OF INNOCENT MORTGAGEE.
In suit by the guardian of a minor Choctaw Indian to have his deed covering his ward's land set aside, as obtained by fraud and misrepresentation, a suit to which the mortgagee of the grantee mortgagor was not a party, judgment canceling, setting aside, and vacating the guardian's deed did not relate back, to the prejudice of the innocent mortgagee for value.

Appeal from the District Court of the United States for the Eastern District of Oklahoma; Joseph W. Woodrough, Judge.

Suit in equity to foreclose a mortgage by the Alliance Trust Company and G. A. Ramsey against Willie Grace Penny. From a decree of foreclosure, defendant appeals. Affirmed.

F. E. Riddle, of Tulsa, Okl. (Harry Hammerly, of Chickasha, Okl., and Stuart, Cruse & Riddle, of Oklahoma City, Okl., on the brief), for appellant.

A. N. Gossett, of Kansas City, Mo. (Barefoot & Carmichael, of Chickasha, Okl., and W. H. Clark, of Muskogee, Okl., on the brief), for appellees.

Ames, Chambers, Lowe & Richardson, of Oklahoma City, Okl., amici curiæ.

Before SANBORN and STONE, Circuit Judges, and TRIEBER, District Judge.

STONE, Circuit Judge. From a decree foreclosing a mortgage on Oklahoma land defendant appeals. The land, patented to appellant, a minor Choctaw Indian, was deeded by his guardian to the mortgagor. Appellant claims that no title passed to the mortgagor, for the two reasons that the deed was absolutely void, and that, if not void, it was, as to this mortgage, voidable, because of notice of lack of authority in the guardian. This claim is founded upon the following propositions: The law of Oklahoma permits guardians to sell lands of minor wards through proceedings in the probate court, consisting generally of application for order of sale, order of sale, and confirmation of sale. There is no authority to exchange such lands

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for other lands or property. The guardian made a contract with the husband of the mortgagor to exchange this land for other lands. To carry out this arrangement a clause of the contract recognized and provided for the necessity of an apparent sale of this land through the probate court. In accordance therewith an application was made to the court to sell the land, an order secured therefor, a report of sale for $5,000 cash to the mortgagor returned to the court, upon which was entered an order confirming the sale and ordering the guardian to execute a deed to the mortgagor for the land. The deed was executed, but in place of cash payment for the land the exchange was carried through under the agreement. Appellant expressly disclaims any charge that the court acted corruptly or with any improper motive in the above proceedings, but claims that it did have knowledge that the sale was only formal, and that the real transaction was an exchange of properties. Appellant contends that this knowledge of the court deprived it of jurisdiction to make the orders of sale and confirmation upon which the deed was based, and therefore that the deed is void. The position of the appellee upon this contention is that the probate court had jurisdiction over sales of this minor's lands; that this proceeding was on its face, as shown by all of the records of that court, a regular and proper sale; that this proceeding cannot be collaterally attacked for alleged jurisdictional defects dehors the record to the prejudice of it, an innocent purchaser for value. Conceding, for the present, that appellee is such innocent purchaser, the first inquiry presented by these contentions of the parties is whether this court proceeding is open to this character of attack.

[1, 2] The rule of public policy which guards judicial judgments from collateral attack, is not only salutary, but necessary. To make judgments unstable is to make courts ineffective. One important purpose for making judgments and the records upon which they are founded public is that they may be relied upon and acted upon. If the court has power to take the action it did take, the verity of that action is impervious to collateral attack. The court has such power, if it has jurisdiction of the persons affected, of the subject-matter, and to make the kind of order entered. Here there can be no question that the probate court had jurisdiction to order sales of land belonging to minor Choctaw Indians. The proceedings were of this character, and were, so far as shown by the record, entirely regular. The circumstance that the guardian intended to take property, instead of cash, for the land, may have been a violation of his duty, but it was not a jurisdictional matter. Nor did the knowledge of such circumstance by the court in advance of the judgment in any way affect the jurisdiction of the court to make an order of sale and to make an order confirming a sale. Such orders are not void,. but at most only voidable. Even where voidable, such action will not be taken to the prejudice of an innocent purchaser for value. Berry v. Tolleson (Okl.) 172 Pac. 630.

Appellant's second contention is that appellee, at the time it took its mortgage, had notice of the real character of the transaction, or that the surrounding circumstances put it upon inquiry which would have

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resulted in notice. This is a question of fact to be resolved from the testimony. A careful examination of all of the evidence, even in the light of argument advanced by counsel for appellant, convinces us that the trial court correctly found that neither actual notice, nor circumstances requiring inquiry which would have resulted in notice, existed.

[3] Appellant's final contention is that, shortly after the mortgage was executed, the guardian successfully sued in the state court to have the deed from him to the mortgagor set aside, because obtained by fraud and misrepresentation, and that such judgment avoiding the title of the mortgagor would defeat that of the mortgagee. The mortgagee was not a party to that suit. It is clear that the effect of such a judgment which "canceled, set aside, and vacated" the deed was not intended to, and could not, relate back to the prejudice of an innocent mortgagee for value.

The judgment is affirmed.

(259 Fed. 560)

BACON v. WARD.

(Circuit Court of Appeals, Eighth Circuit. May 13, 1919.)

No. 5241.

LIMITATION OF ACTIONS ⟹127(18)—AMENDMENTS—EFFECT.

Where plaintiff filed an amended petition sounding in tort, although original action was in contract, *held* that, where defendant promptly moved to strike amended petition from record on ground that it set up a different cause of action, and plaintiff thereafter was granted leave to withdraw amended petition, defendant cannot defeat recovery on ground that filing of amended petition was an abandonment of original cause of action, which permitted the statute of limitations to operate against original cause and bar it.

In Error to the District Court of the United States for the District of Nebraska; Joseph W. Woodrough, Judge.

Action by Kenneth B. Ward against Frank W. Bacon. Judgment for plaintiff and defendant brings error. Affirmed.

Howard H. Baldrige, of Omaha, Neb. (Baker & Ready, of Omaha, Neb., on the brief), for plaintiff in error.

Clinton Brome, of Omaha, Neb. (H. C. Brome, of Warland, Wyo., on the brief), for defendant in error.

Before CARLAND and STONE, Circuit Judges, and Amidon, District Judge.

STONE, Circuit Judge. The sole point in this case is whether recovery is barred by the Nebraska statute of limitations. The original petition in contract was filed within the statute. To this petition answer was filed, followed by reply. Thereafter an amended petition, filed by leave of court, changed the action to one of tort. Promptly defendant filed a motion to strike this amended petition from the record, on the ground that it was a different cause of action. For over

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two years the motion was undisposed of. Then, upon application by plaintiff to withdraw the amended petition, the court ordered:

"That leave be, and the same is, hereby given, to withdraw amended petition filed herein and the case to stand for trial on the original petition."

Shortly afterwards defendant secured leave to withdraw his answer to the original petition and to file a motion for dismissal. This motion was based solely on defect of parties defendant. After overruling of this motion, defendant filed a demurrer to the original petition, based upon several grounds, one of which was that the filing of the amended petition was an abandonment of the original cause of action which permitted the statute of limitations to operate against the original cause and bar it. This contention was preserved throughout the subsequent pleadings and trial, which resulted in recovery under the original petition. The sole question, therefore, is whether the filing and above disposition of the amended petition permitted the statute to run against the original cause of action which had been filed before the statute was a bar?

The defendant, by his motion to strike the amended petition from the record, declared his opposition to the contest as offered in that petition, and his desire to have the court relegate the plaintiff to the cause of action presented in the original petition. Had the court made the order requested, clearly the original petition would automatically have become the only active statement of plaintiff's case. Can the effect be different if the plaintiff, instead of opposing the motion and thus invoking an adverse ruling by the court, sees and confesses the propriety of the motion? That was what, in effect, occurred here. Had it not been for defendant's attack upon the amended petition, there is every reason to believe the case would have been cast on that line. It was only through defendant's act, opposed to plaintiff, that there arose any opportunity for defendant to make the claim of limitations now advanced. To permit defendant to thus profit by his own act would be akin to fraud, and clearly inequitable.

The judgment is affirmed.

(259 Fed. 561)

ADT v. E. KIRSTEIN SONS CO.

(Circuit Court of Appeals, Second Circuit. April 25, 1919.)

No. 188.

Appeal from the District Court of the United States for the Western District of New York.

Suit by Leo F. Adt against the E. Kirstein Sons Company. From a decree for defendant (259 Fed. 277), complainant appeals. Affirmed.

Church & Rich, of Rochester, N. Y., for appellant.

Davis & Simms, of Rochester, N. Y. (C. Schuyler Davis and Percival D. Oviatt, both of Rochester, N. Y., of counsel), for appellee.

Before WARD, ROGERS, and MANTON, Circuit Judges.

PER CURIAM. Decree affirmed.

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(259 Fed. 562)

SCHULTE et al. v. COLORADO TIRE & LEATHER CO. et al.

(Circuit Court of Appeals, Eighth Circuit. May 13, 1919.)

No. 5028.

1. PATENTS ⟹168(2)—INFRINGEMENT—LIMITATION OF CLAIM BY AMENDMENT.
Where, after rejection of a claim for anticipation, it is amended by adding a limiting feature and then allowed, the added feature becomes an essential element, and a structure from which it is omitted does not infringe.

2. PATENTS ⟹129—SUIT FOR INFRINGEMENT—ESTOPPEL.
That a defendant made infringing articles in the belief that it had a valid license, which was in fact void, and under which it now makes no claim, does not estop it from denying the validity of the patent.

3. PATENTS ⟹328—VALIDITY—LEATHER BELTING.
The Sturges patent, No. 965,250, for sectional leather belting, *held* void for lack of utility.

4. TRADE-MARKS AND TRADE-NAMES ⟹93(3)—UNFAIR COMPETITION—ADVERTISING LITERATURE.
Evidence *held* insufficient to establish such similarity between the advertising literature of defendant and complainant as to amount to unfair competition.

Appeal from the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Suit by Joseph H. Schulte and Henry Kaiser, doing business as the Detroit Leather Works, against the Colorado Tire & Leather Company and others. Decree for defendants, and complainants appeal. Affirmed.

C. R. Stickney (Otto F. Barthel and Barthel, Flanders & Barthel, all of Detroit, Mich., on the brief), for appellants.

A. J. O'Brien, of Denver, Colo., for appellees.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

STONE, Circuit Judge. Appeal from dismissal of bill for infringement of letters patent No. 965,250, issued to Varney K. Sturges, assignor to Joseph H. Schulte and Henry Kaiser, and for unfair competition by the use of advertising matter alleged to contain cuts and descriptive matter unfairly and deceptively similar to that put out by appellants.

The patent was for an improvement in sectional leather belting for grooved pulley use. The essential elements of the three claims of the patent are included in claim 3, which is as follows:

"Belting comprising a series of flexible longitudinally tapered elements whose wider ends form the outer face of the belt and whose inner tapered ends are beveled to form a continuous inner belt face, and rivets each securing the broad end of one element to the bodies of two adjacent elements, each element being secured to adjacent elements by a pair of rivets, and the free inner end of each element overlapping the head of the adjacent rivet."

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[1] The breadth of these claims is very much limited by the action of the Patent Office and the patentee in connection with the granting of this patent, as shown by the file wrapper which was in evidence. That file shows that as originally applied for the patent consisted of four claims. Upon examination the entire application was rejected by the examiner on the ground of anticipation by letters patent No. 378,686 to Hunt, and two English patents, No. 11,432 to Hallas, and No. 20,869 to Wiechmann. Thereupon the applicant amended by canceling his first claim and by renumbering and making certain changes in the other three claims. In the old claim 4 (now 3) there was a cancellation of the word "rounded" as descriptive of the wide or broad end of the leather elements. That change was of no consequence and could not have affected the allowance of the patent. The essential changes made by the amendments were by the addition to each of the old claims 2, 3, and 4 (now 1, 2, and 3) of the following: To the end of old claim 2 (now 1), "the free inner end of each strip overlapping the head of the adjacent rivet;" to the end of old claim 3 (now 2), "and being adapted to overlap the heads of the adjacent rivets;" to the end of old claim 4 (now 3), "and the free inner end of each element overlapping the head of the adjacent rivet." It is clear that the sole difference between the rejected belt and that allowed is that in the latter the inner rivet heads are covered by the small free end of the leather elements. By the acceptance of the action of the examiner upon the cited interferences and the later amendment which passed to allowance, the patent is limited by the citation so that it covers only the feature embodied in the amendment; that is, the covering of the inner rivet heads by the overlapping tip or end of the leather elements. Drum v. Turner, 219 Fed. 188, 191, 135 C. C. A. 74.

For a few months, appellees employed this feature in their belts under the honest impression that they were licensees. Later, upon ascertaining their mistake, they adopted a belt substantially like appellants', with the vital difference that the free inner end of each strip or element was cut off abruptly, so that it did not overlap the inner rivet head. This change abandoned the only feature protected by appellants' patent. It is said that, under extreme compression of appellees' form of belt over small pulley wheels, the inner free end of the leather element would partially cover the rivet head. It is evident that the sole object of the change in form of the belt was to avoid this result, and that such avoidance is successful except partially in exceptional instances. There is no infringement.

[2] During the period before appellees changed their belt by clipping off the leather tips which overlapped the inner ends of the rivets they were making a belt which clearly infringed appellants' patent. The circumstance that they honestly believed themselves to be licensees under that patent does not prevent such action from being infringement, where, as here, it is clear that the license was void. Therefore the appellants would be entitled to compensation for such infringement unless, as claimed by appellees, the patent was invalid. Appellees contend that this patent is anticipated in all respects other

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than the covering of the inner rivet heads by English letters patent No. 25,145 to Berisford, and that this excepted feature is not patentable because it fills no useful function. Appellants' answer to this is that, having claimed to act as licensees under the patent during this period of the infringement, appellees are estopped to deny the validity of the patent. The license here was issued to appellees by the patentee after he had assigned all rights to appellants. The position of appellants is, therefore, that they can recover because the license was worthless for infringement of a patent which cannot be attacked by appellees because they honestly acted under that worthless license. There was never any license here. Appellees are not claiming any rights or protection under what they once supposed was a license. The rule invoked by appellants has no application to this situation.

[3] In our judgment, the patents cited by the examiner and the Berisford patent pleaded in the answer would anticipate all of the features of this patent except covering the inner rivet heads, even if the proceedings in the Patent Office did not estop appellants from claiming more than that feature. Appellees contend that this feature is not patentable because entirely lacking in utility. The patent here related to a belt for use upon a particular kind of pulley—one of grooved shape. The evidence is clear that the belt contact upon such a pulley must be at the sides of the pulley, and that to permit the belt to touch the bottom of the groove would necessarily weaken this contact, and therefore the operation of the belt. In short, the inner or bottom edge of the belt must be kept away from contact, so that the grip upon the sides may be undiminished. As the inner heads of the rivets are along the inner or bottom edge of the belt, and the belt passes over only the grooved wheels, it is clear that nothing touches these rivet heads, and therefore they need no protection. Covering the inner rivet heads could have no effect upon the operation of the belt or the protection of the rivet heads which run untouched. There is no useful function whatsoever performed by extending the free inner ends of the tips to cover the rivet heads. No economy in manufacture is shown, and no practical reason why such construction should be preferable to the buying public. This is not urged as a design patent, and was not intended as such by the patentee. The patent is invalid because lacking utility.

[4] As to unfair competition, the testimony showed that both parties used certain circulars and advertising matter. In some ways the illustrations were alike, being a partially unwound spool of belting, a cross-section of the belt on a grooved pulley, side and top views of a piece of belting, and a continuous belt with or without an inclosed legend. None of these illustrations suggested any particular brand or make of that character of belting, except in two instances, one of which inclosed a legend that arose from the wording of the inclosure. In the appellants' that wording was, "Detroit Leather Works—Flexo Laminated Belt—Detroit, Mich.," while in the appellees' that wording was, "Durable 'V' Shaped Belts," with the word "patented" in the literature put out during the supposed license period. In other parts of appellants' advertising they designated the belting as "Flexo

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Laminated 'V' Shaped Belts." The other instance was in the sectional view of the belt, which showed the inner rivet head covered in the appellants' literature, and the same in appellees' literature during the supposed license period, and in a single advertisement in a trade journal shortly after this period, which advertisement had been arranged for during that period.

When appellees discovered that the license under which they were making and selling these belts was worthless, they ceased to overlap the inner rivet heads, and so showed in their sales literature and advertisements. As the patent on this feature was invalid, appellees were not required to do this, and might have continued to put out and advertise the same kind of belts as made by appellants under their supposed patent, so long as they made no attempt to deceive the public into believing they were selling the product of appellants. But this circumstance is valuable, as showing that appellees distinguished their belt from that made by appellants. There is no such similarity in advertising or sales literature as would at any time have deceived, nor was there apparently any intention to deceive, the purchasing public into the belief that appellees were dealing in a belt made by appellants, so that the public would suppose, when they were buying from appellees, that they were getting a belt from appellants' factories.

The trial court found no unfair competition, and there is not only substantial evidence to sustain that finding, but there is no substantial evidence to the contrary.

The decree should be affirmed.

(259 Fed. 565)

FEATHEREDGE RUBBER CO. v. MILLER RUBBER CO. et al.

(Circuit Court of Appeals, Sixth Circuit. June 30, 1919.)

No. 3178.

1. PATENTS ⟹328—INFRINGEMENT—DISCLOSURE.

The Willis and Felix patent, No. 1,045,234, for a process for rubber sponges, *held* invalid; the disclosure of the patent not being sufficient to enable one skilled in the art to manufacture sponges with commercial success.

2. PATENTS ⟹116—DISCLOSURE—SUFFICIENCY.

While no hard and fast formula need be given and experimentation may be necessary to get the best results, the disclosure in a process patent must be sufficient to enable those ordinarily skilled in the art to produce the substantial result desired.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Ohio; John M. Killits, Judge.

Suit by the Featheredge Rubber Company against the Miller Rubber Company and others. From a decree for defendants (250 Fed. 255), complainant appeals. Affirmed.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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Frank T. Brown, of Chicago, Ill., for appellant.

Wm. F. Hall and Melville Church, both of Washington, D. C., for appellees.

Before WARRINGTON and DENISON, Circuit Judges, and COCHRAN, District Judge.

DENISON, Circuit Judge. A patent infringement bill, in the usual form, was dismissed by the court below on final hearing because the patent was thought invalid for the reason that it did not sufficiently disclose the true invention. The patent is No. 1,045,234, issued to Willis and Felix, November 26, 1912, upon an application filed February 4, 1907, and is for a "process for making artificial sponges." The title to the patent had duly passed to the Featheredge Rubber Company, the plaintiff below.

The case rests upon the distinction between sponge rubber and rubber sponge. Sponge rubber is an old and well-known product, and indicates merely rubber which, when vulcanized in mass form, is in considerable degree soft and resilient. The curing or vulcanization of rubber is brought about by subjecting it to a high degree of heat after it has been mixed with sulphur, and perhaps other ingredients, whereby a distinct change in the character of the raw material results. In making sponge rubber, and under the influence of the heat, minute particles of matter which have been disseminated throughout the raw compound gasify, and a minute hollow globular cell is formed from each. The material is rigidly held in a mold of the desired form, and thereby expansion, to any great degree, is prevented. In the typical sponge rubber, these cells are very small. They maintain their formation, and the rubber becomes slightly soft. In the characteristic rubber sponge, this process of interior expansion is carried much further. There is thoroughly mixed with the mass of raw material a suitable quantity of a certain element adapted for thus gasifying and expanding, called the "blowing agent." Water may be used for that purpose or bicarbonate of soda, among many other things. The interior expansion continues until the globular cells are, for example, the size of a pea, and the walls of rubber separating the cells have been stretched so as to be thin and relatively fragile; they are in that form when curing finally takes effect, and each partition becomes a very thin sheet of soft vulcanized rubber. Obviously as soon as the external heat is discontinued, the interior heat will diminish, the interior gases will (or may) partially condense, and each cell, and therefore the whole body, will tend to collapse. These interior cellular walls are then partially broken down or ruptured; the preferred method being by running the mass through a wringer, which compresses what gas remains in each cell to the point of bursting through its walls. When this is accomplished throughout the mass, the air will enter and fill each cell, and the mass will expand approximately to the size it had at the effective moment of vulcanization. If, then, this mass is compressed, as by the hand, expelling the air, and allowed to expand again under water, the water will fill the interior cells, and much of it will be held there until it is squeezed out. This result is called a rubber sponge, because it is

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approximately equivalent to the natural sponge, and is sold for many of the purposes for which the natural sponge has been used.

While, in one sense, the rubber sponge is a mere development of sponge rubber, it must be conceded that they are, commercially and practically, different articles, although the precise dividing line may be difficult to fix. That dividing line is not important, in this case, since the product of both parties is far removed from it. Prior to 1903, rubber sponges were not known in this country, save as importations from Russia. The manufacturers of rubber articles in this country either had not known how to make sponges or had not cared to. With the exception of the matters to be mentioned, the patentees were the earliest to make, in this country, and put upon the market, a practical and successful rubber sponge, and they must be given the chief credit for the successful founding of a new branch of the rubber goods industry.

[1, 2] It had been common to practice vulcanization through steam heat in two methods. The first was to confine the rubber article in a metallic mold and apply the steam heat to the outside of this mold. The second was to expose the rubber article, uncovered, in a tight steam chamber and thereby get a direct application of the steam heat. Sponge rubber had been made in these molds, but it was the theory of the patentees that the molds prevented sufficient expansion to make a good rubber sponge. At the same time they recognized there must be an external pressure upon the rubber to prevent too much internal expansion, and they observed that the direct pressure of the steam upon the outside of the mass of rubber would take the place of the metallic mold and would prevent expansion beyond the point of balance. They made this observation or discovery the basis of their patent; and they reduced the idea to form in several claims, of which No. 3, quoted in the margin is typical.[1] While this claim and the other claims in suit include other features in their stated combinations, it is practically conceded that earlier patents and publications which need not be mentioned show the same combinations, unless it be for this restraining effect of the direct action of the steam in the open steam vulcanizer, and the validity of the patent can be upheld only by dependence upon this feature as being novel in this combination and as thus imparting novelty to the combination.

Several defenses are urged, which have at least plausible force. If all the others could be overcome, there would remain the one upon which the court below chiefly relied, and which can best be appreciated after observing the alleged anticipation by the B. F. Goodrich

[1] Claim 3: The herein-described process of making artificial sponge, which consists in curing a compound of rubber and a material adapted to assume gaseous form on the application of heat, by subjecting the compound to the direct action of steam under pressure sufficient to prevent the escape of the gases generated during the curing operation, whereby the resulting product becomes a cellular structure composed uniformly throughout of contiguous thin-walled closed cells, and after permitting the cooling and contraction of the resulting substance, mechanically breaking down the walls of the contiguous cells formed during the curing operation by thoroughly tearing or slitting them whereby complete intercommunication between contiguous cells is secured, and the resulting material is rendered capable of the ready absorption of liquids.

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Company, of Akron, Ohio. Prior to 1903, the Goodrich Company had sent its president to Russia for the express purpose, among others, of learning how to make the Russian rubber sponge. He acquired this information, or thought he did, and in 1902 and 1903 he proceeded to put it into effect at the company's factory. Sample rubber sponges were produced and given to salesmen. The article was fully described in the regular printed circulars of the company, and a very considerable number of sales were made in all parts of the country. These were followed by some shipments. During 1903 the Goodrich Company undoubtedly produced, sold, and shipped a very substantial number of sponges, practically the same as those later produced by the patentees; but after advertising the article, and offering it for sale for several months, or perhaps a year, the Goodrich Company withdrew its offer and discontinued the manufacture. The testimony in this case puts beyond fair doubt that the Goodrich Company, in this work, used precisely the process described and claimed in the patent in suit, and there would be obvious and complete anticipation save for the effect of that company's discontinuing the business. This is said to transform the whole thing into an abandoned experiment whereby it may not serve as an anticipation; and it is also urged that, in so far as the Goodrich Company used the critical step in the patented process, they did it accidentally and unintelligently, and that they abandoned the effort because they did not understand the underlying theory upon which the patent in suit depends.

Since it had long been common to cure all kinds of rubber articles by exposure to direct steam action, and since a temperature of about 300 degrees Fahrenheit was known to be the appropriate heat for giving the characteristics desired in a rubber sponge, and since the relation between temperature and pressure was invariable, and 300 degrees Fahrenheit, in an open steam vulcanizer, meant, everywhere and always, about 60 pounds pressure, and this was as elementary and obvious then as now, we are not able to believe that the experts of the Goodrich Company did not then understand the tendency of the enveloping steam to have the effect of a restraining mold just as well as they did after reading this specification. They gave up the business because, though they could and did make good sponges, the percentage of failure was too great. This result—some failure and some success—could not come from a neglect to get the appropriate steam pressure, because, if they had the right heat, they must have had the right pressure, and it is not to be supposed that they would have been careless and nonobservant as to their temperatures.

We are convinced that the real reason for their partial failure must have been that they did not sufficiently understand the necessary composition of the rubber compound to be used. This leads us to observe that the specification of the patent in suit gives no precise information upon this point. It is the theory of the patent, and the specification distinctly states, that the user of the process may take any raw rubber compound, which he may buy upon the market, and incorporate with it any blowing agent commonly used for producing internal expansion, and thereupon treat this material by the patented pro-

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cess. If this language is taken at its face, and if there was among the rubber compounds then on the market any one which, treated with some selected one of the blowing agents then known and in use, would fail, the specification would seem to be deceptive and insufficient; and plaintiff's counsel concede that, if this test is applied, the patent must fail. For the purposes of this opinion, however, we accept their contention that the patent will be valid if the person then ordinarily skilled in the art could, by reason of his skill, select an appropriate compound and blowing agent from those on the market, and, as the result of this selection, could successfully practice the patented process.

Even this liberality of rule will not save the patent. The proof to this effect is entirely convincing. We notice only two facts, out of the many in proof, which tend to this result. One is that an expert selected by plaintiff, and fully taught by the patent and aided by consultation with plaintiff's factory experts, selected and purchased compounds which were upon the market in 1907, and added blowing agents according to his judgment, and, in a considerable number of tests, entirely failed to make anything which could be defined as a rubber sponge, under the definition which plaintiff must adopt in order to support its theory of invention. From these tests, he got only a fair or good sponge rubber. The other is that plaintiff uses, and defendant uses, and this expert, when he finally succeeded in making good sponges, used, a peculiar and special ingredient ("paragol," a corn oil substitute) in the compound, which ingredient serves as a blowing agent, and probably also has other qualities, and which ingredient, as entering into this compound, was early discovered by and has always been used by plaintiff, but was kept secret until defendant learned about it and began to use it to make successful sponges in competition. No one, seemingly, has ever made a satisfactory sponge without using "paragol," or its equivalent, in addition to the specific blowing agent, and it does not appear that compounds containing this ingredient, or an equivalent, in proportions suitable for the uses now involved, were upon the market, or, indeed, known to any one, in 1907.

We do not overlook the formula given in the Lefferts patent of 1902, nor the reference to corn oil substitute in the text book of 1899. Paragol is not indicated in the Lefferts patent, save by the very generic name "rubber substitute," of which there were scores; nor was the Lefferts compound intended for any use comparaable to that of these patentees, nor did Lefferts give any proportions. The text-book does not indicate that corn oil substitutes had any of the peculiar qualities which now seem to make paragol, or something like it, essential to the rubber sponge. We think there is no reasonable escape from the conclusion that the patentees' real discovery was not in what they disclosed in their specification, but in what they concealed, and that their purpose was to get the protection of a patent, and, at the same time, hold back the knowledge which would allow the public to manufacture successfully at the end of the patent term. The testimony of one of the patentees is directly to this effect, but he is now interested adversely to the plaintiff, and we do not find it necessary to place dependence on that testimony.

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It is not important that no hard and fast formula is given, nor that considerable skill and experimentation may be necessary to get the best results. Minerals, etc., v. Hyde, 242 U. S. 261, 37 Sup. Ct. 82, 61 L. Ed. 286. The trouble here is that those ordinarily skilled could not practice the invention with even a tolerable degree of success, unless after a series of blind experimentation, which might happen to give the necessary information, but might not. If intelligible and fairly specific directions had been given as to the qualities the compound must have, plaintiffs' case would have a better aspect; but this was not done. We find specified only the four qualities desired in the final product, and not only are these qualities not substantially present in any compound that any one has used, but they are all ascribed to the patented treatment. To say, as is said by implication, if at all, that the raw material must have those inherent qualities which are necessary to make the patented process work successfully, and to stop there, is to add nothing to the reader's previous knowledge.

From our conclusion of fact as to lack of disclosure, the invalidity of the patent necessarily follows. Sewall v. Jones, 91 U. S. 171, 23 L. Ed. 275; Mowry v. Whitney, 14 Wall. 620, 20 L. Ed. 860.

The decree of the court below is affirmed.

(259 Fed. 570)

STRAUB v. CAMPBELL et al.

(Circuit Court of Appeals, Third Circuit. July 3, 1919.)

No. 2449.

PATENTS ⟹328—VALIDITY AND INFRINGEMENT—BUILDING BLOCKS.

The Straub patent, No. 1,212,840, for building block and method of making the same, the block being composed of a mixture of coarse and fine coal cinders and ashes, retaining all the original mass, cement, and water, discloses novelty and invention of a meritorious character; also *held* infringed.

Appeal from the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Suit by Francis J. Straub against H. P. Campbell and Jacob Miller. Decree for defendants, and complainant appeals. Reversed.

Charles M. Clarke, of Pittsburgh, Pa. (R. A. & James Balph and Benj. H. Thompson, all of Pittsburgh, Pa., of counsel), for appellant.

T. Bertram Humphries, of Pittsburgh, Pa., for appellees.

Before BUFFINGTON and WOOLLEY, Circuit Judges, and MORRIS, District Judge.

BUFFINGTON, Circuit Judge. In the court below Francis J. Straub brought suit against H. P. Campbell and Jacob Miller, charging them with infringing patent No. 1,212,840, applied for November 9, 1915, and granted to him January 16, 1917, "for building block and method of making the same." A decree was taken pro confesso against Miller. On final hearing the court below held the patent in-

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valid for lack of invention, and entered a decree that the patent was invalid, and that defendants did not infringe, and dismissed the bill. Thereupon Straub took this appeal.

In building operations the use has greatly increased of blocks prepared in advance and set in place, usually for interior walls, but often for exterior ones also. The advantage of their use is quite apparent from several practical standpoints. In the first place, walls made from them are soundproof, dampproof, fireproof, and are electrically nonconductors. Conduit openings can be made through them. Their considerable size enables walls to be built with less labor than if they were smaller. They can be built in large quantities in factories and transported with little breakage, thus saving operative space in the buildings as they progress. Their cheapness, their size, their form, the convenience in handling, together with other advantages, showed that the use of them was, and will be, a growing one in building operations.

Such blocks, prior to the patent in suit, were usually made of burned clay, or of concrete formed by a mixture of sand and cement. In some cases plaster of paris or lime was also used. Walls built of these structures were open to a very practical objection. As laths and wooden rails and other fixtures had to be nailed to the walls as the building advanced, and as nails could not be driven into these concrete blocks, or, if driven into blocks which contained plaster of paris or lime, would not hold, it was necessary that wooden strips should be inlaid or built in the wall as the blocks were laid. Into such strips the nails for the laths, etc., could be driven. Later, by reason of the trouble which was often caused by the block setter failing to build in such wooden strips, Straub's attention was called to the need of a building block into which a nail could be driven after the wall was built. For it was quite evident that, if such a block could be constructed, it would not only allow wooden strips to be nailed to the block after the wall was built, but it could be done at any place where it might afterward appear they were required. After many experimental efforts and some three years spent in trial, Straub at last made the block of the patent in suit.

The gist of his invention, for such we think it is, was in taking ordinary furnace ashes and using the whole of that product, without sifting or selection. He found that, by taking the whole of the ashes—clinkers, fine dust, and all—and grinding the entire product and mixing it with cement and water, he was able to produce a new and useful article in the building art. In the first place, it was new and so novel that, when the attention of a scientific journal was called to the possibility of its use, its reply was:

> "We know of no manufacture of cinder concrete blocks, and see very little reason for their use. They might stand fire a little better than ordinary concrete blocks, *if the cinders were well selected and screened and all unburned coal removed;* but in any case the crushing strength would be lower than with a well-made concrete block."

From this it will be seen that in the minds of those versed in the art the possibility of a cinder concrete block was not recognized, even

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when suggested; if they were used it was thought that the cinders had to be selected and screened, and that, if made, their crushing strength would be lower than that of concrete blocks. The practical results, however, of Straub's novel experiment, and the success of his block, are abundantly proved, not only by the exact copying thereof by infringers, but by the uncontradicted testimony of practical men in the art. Brown, a builder and contractor, testified as follows:

"I know Mr. Straub, the plaintiff, and am fairly familiar with his building block, and have used it in my business. It has features for building construction that I personally prefer over any other material in use. The cost is lower, and the material is practically fireproof and dampproof. I think those are the main reasons. It is a nonconductor of sound. I have noticed that, and heat and cold. I think you can secure a trim by driving nails into it. I can testify that nails hold very well in it, just as good as in wood. I have been in the contracting business for over 4 years, and before that in the bricklaying business for 25 years. In my travels I never saw a building block similar to the Straub block, and never heard of a cinder block until I saw Straub's block. It has made considerable of a reputation as a first-class article. I would pronounce it a first-class building material."

White, another contractor, testified:

"I know the Straub block, and have used it in building very extensively. I have found it superior to any other thing that has ever been got out. It has all the qualities of a hollow tile, and it is much better to nail to it, and there is not so much breakage in it. We don't have the percentage of loss that we do in other materials, and you can use it for putting the nailing blocks on the outside and nailing blocks on the inside. * * * When you put sand in the block, it becomes a dense, hard block. It will not give like a cinder block. That is the reason I use the Straub block entirely, where I have to timber up. Aside from the facility of driving nails into it and the expansibility of the block, it has the advantage over all clay products."

Murray, another contractor, says:

"This Straub block is a cheaper construction than almost anything else in that line. It is cheaper, because it is made out of cinders, that practically cost nothing, and cement and water. * * * I never heard of a cinder block before I heard of Mr. Straub's. I have been in the building business for 25 years."

Strong, an architect, testified as follows, as to the Straub building block:

"I used it in place of hollow tile, because we liked it better. It was more soundproof; it was an economical thing to buy and to use; it represented a good mechanical bond for the mortar for plastering; it was not fragile. It would hold nails that were necessary to drive. It was also useful, in that it was possible to stick a pipe through the plastering without fracturing, as one has to do in the case of hollow tile."

The proofs also show that the demand for these blocks has been such that Straub was not able to fill them. Not only was the composition of the block novel, but the grinding of furnace cinders into the fine mixture required for Straub's blocks was so original that large and experienced firms which made lines of crushers could neither furnish nor suggest rolls suitable for the ash crushing which Straub required. He was, therefore, compelled to devise special rolls for that purpose,

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and while these rolls are not a part of his patent, it will be noted that Straub made them, and Campbell, who here defends, made no blocks like Straub's until he copied Straub's crushing rolls. While the use of cinders in groutings, in foundations, in walks, roads, and other structures, was old, and while even screened ashes had been used in building blocks, no one before Straub conceived the novel idea of taking the whole ash product—clinkers and ash alike, half burned and wholly burned, lumps and dust—in fact, the entire run of the grate, and using the whole waste product in its raw state, rolling or grinding the whole mass. So novel was this joint use of the whole ash mass, in connection with cement and water, that the Patent Office granted to Straub the broad claim of:

"A building block composed of a mixture of coarse and fine coal cinders and ashes, retaining all the original mass, cement and water."

From this claim and a statement of the prior art, which Straub fairly stated in his patent,[1] and which we copy in the margin, it will be seen that the gist of Straub's invention is the use of cinders and ash as a whole, without screening or choice of any one or more of its parts. The product Straub gave in his building block is new in

[1] "Ordinarily, concrete mixtures of various kinds utilize sand, crushed stone, or other mineral as a body or filler, either wholly or partly in combination with the required proportion of cement as a binder. In carrying out my invention, I use coal cinders or ashes, which are first crushed or ground to a consistency composed of pieces not larger than say three-quarters of an inch, and retaining all of the smaller sizes and the dust and fine ashes, which are otherwise ordinarily thrown away as refuse. This crushed material, after reducing the larger lumps and clinkers, which are more or less porous, provides the coarser pieces or lumps of a maximum size sufficiently small to enable the cement to penetrate through their pores and interstices and bind the entire mass in a homogeneous body. The ground mixture also retains all of the usual accompanying adhering portions of the cinders in the resulting product, and it is essential that the original mass of cinders and ashes as it comes from the furnace, grate bars, or other source, remains in the resulting mixture without separation or change of proportions. A suitable proportion of cement, say one-sixth, is added with the necessary water, and the batch is then very thoroughly mixed. The retained finer cinder and ashes, combined with the cement, thoroughly mixes with the larger pieces, providing a uniform quality of all sizes throughout, and measured portions of the resulting mass are then dried. Owing to the absence of sand or other similar material, the resulting blocks, etc., harden by natural evaporation, and at the same time retain the porous light qualities of the original cinders to a very considerable degree, while at the same time having the necessary strength and resistance to crushing strains. The presence of the larger lumps regularly mixed throughout the mass maintain sufficient porosity to insure avoidance of moisture, while the light consistency of the entire body, and the avoidance of great density and accompanying resistance by elimination of sand or the like, leaves the block in a condition of penetrability or cleavage by any sharp instrument. It can therefore be driven into by a nail, or easily cut, without impairing its strength or homogeneity, so that it may be easily used for attachment of wooden trim, etc., without the necessity of supplemental nailing strips or the like. The surface, being rough and uneven, is likewise of great holding affinity for plaster or other like coating material, so that the blocks are well adapted to building purposes. They are fireproof, moisture proof, and soundproof, and, due to the low cost of the raw material and labor, are extremely cheap."

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make-up and new in function, in that while, like the old block, it is proof against sound, water, fire, and electric current, Straub's has the wholly new feature of allowing a nail to be driven in it without breaking, and firmly holding the nail in place. It is light of weight, and cheaper than former blocks. It can be broken on nearly straight lines, and he offered to prove, and could presumably have done so, had the testimony been admitted, that the relative tensile strength of his cinder block to concrete block was as 846 to 691.

After full consideration of the proofs, we have reached the conclusion that Straub made a valuable contribution to the building art, that his patent is valid, and that Campbell is an infringer. Before Straub's block came on the market, Campbell had made blocks of sand and cement. He changed from that process and copied Straub's by making a block which used the entire ash body; the cinders and ash being crushed together on rolls of Straub's design. It is said he does not infringe, because he uses sand. Now, while it is clear that Straub uses no sand, and that his patent said none was to be used, and that sand is not an element of the claim quoted above, the weight of the proof shows us that Campbell uses the small amount of sand he does, not to make a building block that a nail cannot be driven into, not to make his block unlike Straub's, or to forego and avoid what Straub showed in his patent, but to really get the real thing Straub gave the building art, and escape paying tribute for such use by using a small and negligible quantity of sand. Campbell's infringing block does not make the block nailproof, as the sand and cement blocks he was previously manufacturing were; but one can drive nails into the infringing block, and the block holds the nails just as Straub first showed could be done. Taught by Straub, and copying and using his teachings in substantial and functional form, Campbell must be decreed an infringer.

The decree below will therefore be reversed, and the cause remanded, with instructions to reinstate the bill and enter decree holding this patent infringed, and directing an accounting.

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(259 Fed. 737)

TURNER, Appellant, v. WOODARD et al.

CHILD, Appellant, v. SAME.

ROSS, Plaintiff in Error, v. TURNER et al.

ROSS, Appellant, v. SAME.

In re UNITED STATES, Petitioner for Condemnation of Certain Lands in Hull.

(Circuit Court of Appeals, First Circuit. July 23, 1919.)

Nos. 1408, 1409, 1411, 1412.

1. EMINENT DOMAIN ⟹168(2)—CONDEMNATION—PROCEEDINGS BY UNITED STATES.

Under Act Aug. 18, 1890 (Comp. St. § 6911), the Secretary of War may cause proceedings to be instituted in any court having jurisdiction of such proceedings for the acquisition by condemnation of lands in accordance with the laws relating to suits for condemnation of property of the states wherein the proceedings may be initiated, but, if the owner fixes a price which is reasonable, the Secretary may purchase forthwith.

2. EMINENT DOMAIN ⟹243(1)—AWARD OF COMPENSATION—EFFECT.

Under Rev. Laws Mass. c. 1, § 7; chapter 48, §§ 22, 114, and chapter 111, §§ 112, 113, made applicable by Act Aug. 18, 1890 (Comp. St. § 6911), to proceedings by the United States for the condemnation of lands, the United States, or either party, may file a petition to determine by jury the value of the land to be condemned, and while the government is given an option to abandon proceedings, if it deems the valuation excessive, yet the land so valued must, if taken, unless the parties otherwise agree, be paid for at the value thus fixed, together with the payment of costs and reasonable expenses.

3. EMINENT DOMAIN ⟹158—RIGHT TO AWARD—EQUITABLE PROCEEDINGS—WHAT CONSTITUTE.

Where all the parties interested in the fund to be derived from the condemnation of land by the United States, title to which stood in the name of a bankrupt, and which was incumbered by mortgages, agreed that the proceeds should be paid into court, which should have full power and authority to determine the respective rights and priorities of the claimants, the proceeding must be deemed an equitable one, for only equity could determine the rights of intervening creditors, mortgagees, etc.

4. COURTS ⟹359—FEDERAL COURT—ATTORNEY'S LIEN—LOCAL LAW.

Federal courts recognize no lien of an attorney at common law beyond that given by the local law.

5. ATTORNEY AND CLIENT ⟹175—COMPENSATION—LIEN.

Rev. Laws Mass. c. 165, § 48, giving an attorney who has prosecuted a suit to final judgment a lien thereon for the amount of his fees and disbursements, covers only attorney's fees allowed in the bill of costs, thus distinguishing attorney's fees from counsel fees.

6. COURTS ⟹366(1)—PRECEDENTS—DECISIONS—STATE STATUTES.

The decision of the highest state court construing a state statute is binding on the federal courts.

7. ATTORNEY AND CLIENT ⟹175—COMPENSATION—LIEN—RIGHT TO.

Attorneys for a bankrupt, who rendered services in connection with the condemnation by the United States of property, title to which stood in the bankrupt's name, both before and after bankruptcy, and whose services resulted in the obtaining of a sum considerably greater than that which the government originally offered to pay, *held* not entitled to collect for their services and disbursements on the theory of analogy to the case where one of several persons interested in trust property or a

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fund brings a suit for its preservation or administration, in which case the court will order him to be reimbursed.

8. EQUITY ⟹66—MAXIM—SEEKING EQUITY.

Where all of the parties interested in the proceeds resulting from the condemnation by the United States of land, title to which stood in the name of one who before end of the proceedings became a bankrupt, agreed that on payment of the value as fixed by the jury, the court should decide the equities, *held* that, as the proceeding had to be treated as an equitable one, or the parties would be out of court, the maxim, "He who seeks equity must do equity," is applicable to all.

9. ESTOPPEL ⟹79—EQUITABLE ESTOPPEL.

In a contest between various claimants of a fund arising out of condemnation by the United States of land, title to which stood in the name of one who before end of proceedings became a bankrupt, *held*, on the peculiar facts in this case, that the various parties, who signed an agreement that the money should be deposited in court and distributed, were estopped from denying the right of the attorneys for the bankrupt to recover for their disbursements and services which resulted in obtaining an increased valuation.

10. ATTORNEY AND CLIENT ⟹135—COMPENSATION.

Attorneys for a bankrupt, who rendered services in connection with the condemnation by the United States of property standing in the name of the bankrupt, which property, however, was incumbered, and to which other creditors asserted claims, *held*, on the peculiar facts in this case, entitled to compensation for their services; the attorneys and all parties having agreed that the government should receive the property on payment of the value as fixed by the jury without payment of costs and disbursements, payment of which the attorneys might have insisted upon under Rev. Laws Mass. c. 1, § 7, which was made applicable by Act Aug. 18, 1890 (Comp. St. § 6911).

11. PAYMENT ⟹39(6)—APPLICATION—RIGHT OF CREDITOR.

A creditor, holding security generally applicable to all his loans, may apply the proceeds of any of such securities primarily in payment of debts not otherwise secured.

12. PAYMENT ⟹39(4)—APPLICATION—RIGHT OF CREDITOR.

An unsecured creditor of one C. agreed to make a further loan to be secured by a note executed by the bankrupt as well as by the deposit as collateral of mining stock, the offer of C. providing that the security should be applicable to other indebtedness; after the bankrupt had applied the dividends from the mining stock to C.'s previous unsecured indebtedness, and the bankrupt executed a mortgage to secure its note, then overdue, *held*, that the application of the dividends was within the power of the creditor, and other creditors of the bankrupt were not entitled to assert that dividends should have been treated as having discharged the bankrupt's note.

Appeals from and in Error to the District Court of the United States for the District of Massachusetts; James M. Morton, Judge.

In the matter of the petition of the United States for condemnation of certain lands in the township of Hull, title to which was in Benjamin P. Cheney, who became a bankrupt prior to the acquisition of the lands by the government. Samuel Ross intervened, as did William D. Turner and Samuel M. Child, asserting rights in the funds paid into court by the United States, which were contested by Henry Woodard and others, who also intervened. From decrees denying their claims, Turner and Child appeal, and Ross appeals and brings error. Decrees reversed in each case, and remanded for further proceedings.

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William D. Turner, of Boston, Mass. (Hale & Dickerman, of Boston, Mass., on the brief), for appellants Turner and Child and for Allan Forbes, trustee.

Robert G. Dodge, of Boston, Mass. (Harold S. Davis, of Boston, Mass., on the brief), for plaintiff in error and appellee Ross.

Robert Cushman, of Boston, Mass. (Charles D. Woodberry, of Boston, Mass., on the brief), for appellee Woodard.

John P. Wright, of Boston, Mass. (Tyler, Tucker, Eames & Wright, of Boston, Mass., on the brief), for respondent J. R. Whipple Co.

Before BINGHAM, ANDERSON, and JOHNSON, Circuit Judges.

ANDERSON, Circuit Judge. The entitling alone is enough to show that this is an extraordinary record to present to an appellate court. In earlier times, when technical rules of procedure were more strictly insisted upon, no appellate court would, on such a record, have considered the issues involved. This record is objectionable, not merely in form, but on some of the questions calling for determination the disclosure of facts is scant and most unsatisfactory. We have hesitated whether the case should not be remanded to the District Court for further hearing, or dismissed entirely on the ground that only on independent equity proceedings can the questions raised be properly heard and determined.

But after careful and laborious consideration we have reached conclusions which we think just and not inconsistent with established rules of law. Our action in dealing with this case on this highly unsatisfactory record is not to be taken as a precedent.

Nos. 1408, 1409, and 1412 are appeals from orders of the District Court denying the appellants' right to share in a fund of $46,500 paid pursuant to stipulation of various claimants into the registry of the District Court by the United States under a decree of condemnation of Calf Island and Little Calf Island, situated in the township of Hull, record title to which at the time of the initial proceedings by the United States stood in the name of Benjamin P. Cheney, now a bankrupt.

No. 1411 is an alternate proceeding by Ross, seeking to raise by writ of error the same questions involved in his appeal. Ross' claim is that he was one of two second mortgagees of the premises. His claim was denied on the ground that his mortgage note of $15,000, dated March 25, 1913, had been paid by the application of the proceeds of other security held by him.

Child's claim is for $2,500 counsel fees and $931.77 for expenses incurred in connection with the trial of the case. Turner's claim is for $2,500 counsel fees and $450 expenses incurred in like manner. Child and Turner both appeared originally as counsel for Benjamin P. Cheney, adjudged a bankrupt on January 14, 1918.

The proceedings began by a petition filed by the United States on May 8, 1917, alleging that these two islands in Boston Harbor were needed for fortification purposes. The petition is entitled a "Petition for Condemnation," but this is really a misnomer. The statutes under

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which the United States was then compelled in this district to proceed in order to obtain title to lands needed for war purposes were complicated and peculiar. A new and much needed statute was enacted on July 2, 1917 (40 Stat. 241, c. 35). See U. S. Comp. St. 1918, § 6911a.

[1, 2] The petition was filed under Act Aug. 18, 1890, c. 797, 26 Stat. 316, Compiled Stat. Ann. 1916, § 6911. This statute provides in effect that the Secretary of War may cause proceedings to be instituted in any court having jurisdiction of such proceedings for the acquiring by condemnation of lands, etc., such proceedings to be instituted in accordance with the laws relating to suits for the condemnation of property of the states wherein the proceedings may be initiated, with the proviso that if the owner fixes a price which is reasonable the Secretary may purchase without further delay. United States v. Certain Lands in New Castle (C. C.) 165 Fed. 783; Nahant v. United States, 136 Fed. 273, 70 C. C. A. 641, 69 L. R. A. 723; United States v. Nahant, 153 Fed. 520, 82 C. C. A. 470.

The statutes of Massachusetts thus made applicable are Revised Laws, c. 1, § 7, which, by reference, incorporates chapter 48, §§ 22 and 114, and also by reference chapter 111, §§ 112, 113. Revised Laws, c. 1, § 7, provides in substance that, failing agreement between the United States and the owner of lands desired for federal public purposes, either party may file a petition for valuation thereof; such petition must contain a description of the premises; the court, after notice to all parties in interest, is to determine by a jury the value of the estate; if there are claimants other than owners of the fee, the value of their interest is to be ascertained and apportioned as provided in Revised Laws, c. 48, § 22. "If the value so determined, with costs and reasonable expenses to be taxed by the court, is, within one month after final judgment, paid or tendered to said owners, or persons interested, * * * the fee of said estate shall thereupon vest in the United States."

Revised Laws, c. 48, § 22, provides that the jury shall find the total amount of damage and apportion the same among the several parties found entitled thereto in proportion to their several interests and to the damages sustained by them. This provision applies to the case of leaseholds or other rights ousted by the assertion of paramount government power.

Section 114 of said chapter 48 provides for the case of mortgaged land taken for public uses, and by reference to Revised Laws, c. 111, § 113, provides for the entry of a separate judgment for each mortgagee, who holds such judgment in trust to satisfy his debt and to pay over any balance to any other person entitled thereto. While section 20 of chapter 48 provides that any party who has an estate in property so taken may have his damages assessed, we find nowhere any provision in which the rights in land or in its proceeds of an attaching creditor can be determined by a jury. The right of an attaching creditor whose claim has not been reduced to judgment is not an "estate" within the meaning of these statutes.

Trial by a jury under these complicated statutory provisions results, not in a real condemnation of the land by the action of the United

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States, but only in fixing a value or price which, if paid or tendered by the government within one month, results in vesting the fee in the United States. The government is not obliged to pay the amount of such final judgment and to take title to the land thus valued. If it deems the valuation thus fixed excessive, or for any other reason does not desire to acquire title on the terms thus fixed, the whole proceeding may be abandoned.

But land so valued must, if taken, unless the parties otherwise agree, be paid for at the value thus fixed. The statute contemplates the payment of costs and reasonable expenses, but there is no provision for interest accruing between the date of the petition and the time of the payment of the money, though the land must be valued as of the date of filing the petition. Burt v. Merchants' Ins. Co., 115 Mass. 1. While the owner retains possession until payment, the pendency of such proceedings obviously makes his property unsalable to a would-be user; the owner may use such property; practically he cannot sell it. Cf. U. S. v. Nahant, 153 Fed. 520, 525, 82 C. C. A. 470. Obviously, this legal machinery is cumbersome, awkward, and fraught with needless complications and pitfalls.

The petition in this case alleged that the government of the United States was informed that Benjamin P. Cheney was interested in fee in the lands described, "but the nature and extent of his interest are to the said United States unknown"; that there was outstanding a first mortgage running to Olney et al., trustees (as to which no controversy is now involved), and a second mortgage dated July 29, 1914, from Cheney to Henry F. Woodard and Samuel Ross. The prayers were for a notice to all persons claiming any right in the lands, for a valuation by a jury, and that verdict being accepted and payment being made within one month thereafter, fee of said lands might thereupon vest in the United States.

The first mortgagees promptly intervened. Cheney appeared by the appellants Turner and Child. On July 24, 1917, Woodard and Ross filed a petition to intervene, setting out that they held a mortgage dated July 29, 1914, to secure two notes each of $15,000, one dated March 5, 1913, and the other November 10, 1913, both of which were alleged to remain wholly due and unpaid.

The respondent J. R. Whipple Company, on July 24, 1917, filed a petition for leave to intervene, alleging that on October 15, 1915, Cheney was indebted to it for $18,333.05, for which it had brought suit in the superior court for Suffolk county, and had attached all Cheney's real estate, including the premises in question; that the attachment was not discharged, and that Cheney still owed the petitioner $16,333.05. The petitioner therefore alleged it had an interest in the land sought to be condemned, and prayed to be admitted as a party respondent in said condemnation proceedings.

The town of Hull, claiming unpaid taxes, also petitioned to be allowed to intervene and have its damages assessed by the jury. No question arises on this record out of this petition.

When the cause came on for trial a discussion immediately arose as to the admission of the second mortgagees, represented by Mr. Wood-

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ard, one of the second mortgagees and a practicing attorney in Washington, D. C., who appeared in person. Both he and the representative of the J. R. Whipple Company, the attaching creditor, were zealous to assert their alleged rights in the proceeds of the expected taking by the government. The fact that the property was incumbered by first and second mortgages and by an attachment for over $18,000 then nearly two years old, and that the representatives of these various alleged creditors were alert to assert their claims, indicated that Cheney was insolvent and so regarded, and had only a remote and improbable interest in the proceeds. In fact he was adjudicated a bankrupt about six months later. It follows that Child and Turner really acted throughout for the benefit of all parties ultimately interested in the fund. They were at no time acting solely in Cheney's interest. Their claim is, in this important particular, distinguishable from the claim of Talbot dealt with in Gregory v. Pike, 67 Fed. 837, 843, 15 C. C. A. 33.

Turner and Child insisted that the provisions of the Massachusetts statute for admitting mortgagees were not applicable in these proceedings by the United States because, under this special statute, the assessment comes before any taking; that there might never be any taking; that mortgagees and attaching creditors could assert their rights only if there was a fund in court; and that there might never be any fund in court.

Woodard, in behalf of himself and Ross, insisted that they should be admitted as parties in order that they might not lose their rights permanently. After discussion, the court ruled that the trial of the case should be left to counsel representing Cheney, so that there would be no confusion at the trial. This ruling was expressly based upon the court's understanding that "Mr. Woodard is perfectly content to do that."

Although the second mortgagees and the attaching creditor were, through their representatives, insistent upon their rights in the contingent fund, it is worth noting that none of them offered to take or share the burden and expense of the trial. They claimed that the prospective fund belonged to the creditors of Cheney, and not to Cheney; but they were quite content to allow Turner and Child to assume the burden and expense of the valuation, which was a condition precedent to the existence of any fund in which any of the parties in interest or alleged interest might share.

[3] The parties thereupon on July 27, 1917, entered into a written stipulation as follows:

"It is hereby stipulated and agreed by all parties in interest, with the approval and consent of the court, that the only issue to be submitted to this jury shall be the value of the property in question. And by consent of all parties, if the value so determined, with costs and reasonable expenses to be taxed by the court, shall, within one month after final judgment, be paid into court, instead of paid or tendered to the parties hereto or persons interested, the fee of said property shall thereupon vest in the United States of America.

"The court shall have full power and authority, after the payment of said fund into court, to determine the respective rights and the priority thereto of all parties claiming said fund, as fully and effectively as if any and all issues respecting the same had been determined by a verdict of this jury.

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"The court, without jury, shall proceed upon application of any party in interest, to hear and determine the legal and proper apportionment of said fund among the parties claimant, subject to review on matters of law, and all parties hereto agree, in open court, that upon payment into court of said fund, each shall, on request, make, execute, and deliver to the United States of America such other and further deeds or releases as may be deemed necessary to vest the title of said property in the United States of America.

"Benjamin P. Cheney.
"Henry F. Woodard.
"Samuel Ross.
"William H. Garland,
"Attorney for J. R. Whipple Company.
"Frederick E. Snow and
"Benjamin P. Cheney,
"Trustees under the Will of Benjamin P. Cheney,
"By their Attorneys,
"Gaston, Snow & Saltonstall.
"Town of Hull,
"By Its Solicitor, Thomas N. Buttimer."

To this stipulation, it will be observed, the United States is not a party. It is also obvious that if, as the result of the proceedings, such fund should be paid into court, the determination of the rights of the parties claimant, inter sese, was necessarily a proceeding in equity. Only in equity could the rights of the mortgagees and of attaching creditors be determined. Hooven, Owens & Rentschler Co. v. Featherstone's Sons, 111 Fed. 81, 87, 49 C. C. A. 229; Spring Garden Ins. Co. v. Amusement Syn. Co., 178 Fed. 519, 530, 102 C. C. A. 29; Bates v. Boston El. Ry., 187 Mass. 328, 341, 72 N. E. 1017; Wood v. Westborough, 140 Mass. 403, 5 N. E. 613; Dwight v. County Com'rs, 7 Cush. (Mass.) 533.

The trial thereupon proceeded. The government contended that the fair market value of the property was about $22,000. Witnesses produced by Turner and Child claimed that it was worth from $75,000 to $100,000. The verdict of the jury was for $46,500. The appellant Child incurred and paid out of his own resources $931.77 for expert witnesses and other expenses incidental to the preparation and trial of such a cause. Turner paid $450 for expert witnesses.

Counsel agree—and the District Court expressly finds—that these expenses were reasonable and proper and inured to the benefit of all parties in interest. Cheney's insolvency obviously constrained Child and Turner to make these advances from their own funds, relying on reimbursement from the proceeds of the land. None of the other parties claimant were prepared or offered to make the requisite expenditures or render the essential professional services.

Cheney was desirous of accepting the verdict of the jury. But the government filed a motion to set the verdict aside as excessive and as against the evidence. This motion was overruled in October, 1917. The government also filed a bill of exceptions, upon which the appellants Child and Turner expended a large amount of labor.

Pending the settlement of the exceptions, Cheney was adjudicated a bankrupt on January 14, 1918. On April 16, 1918, Allan Forbes as trustee in bankruptcy intervened in the proceedings.

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It is a fair inference from the record that after nearly a year's delay all the parties in interest became desirous of having the government take the Cheney property at $46,500, even without payment by the government of costs or expenses and without interest; that as the result of negotiations carried on by Turner and Child it was ascertained that the government would pay the face of the verdict, $46,500, and nothing more. Thereupon, under date of June 18, 1918, Turner notified the court that there was no appropriation by the government available for allowance of costs and expenses, and that therefore he and Child would "rely instead upon the discretionary power which the court has, where one party has succeeded in bringing a fund into court for the benefit of other parties as well, to allow costs and compensation out of the fund."

On June 28, 1918, Turner filed his petition for leave to intervene, setting up therein the substance of the facts above referred to, and asking to be allowed the sum of $2,950.

On July 23, 1918, Child also filed a petition asking for an allowance of $2,500 counsel fees and $931.77 expenses. On the same date the court made a decree of condemnation, which recited the bringing of the petition, the appearance of the first mortgagees, of the second mortgagees, of the attaching creditor, of the town of Hull, and the stipulation that the parties agreed—

"that the only issue to be submitted to said jury should be the value of the property in question, and that if the value so determined, with costs and reasonable expenses to be taxed by the court, should within one month after final judgment be paid into court, the fee of said property should thereupon vest in the United States."

That on April 16, 1918, Allan Forbes, as trustee in bankruptcy of said Benjamin P. Cheney, filed his petition to intervene, and that thereafter Turner and Child had filed their petitions claiming allowance for counsel fees and expenses incurred, which petitions to intervene had been allowed. It was therefore decreed that on May 9, 1917, Cheney was the sole owner, subject to such rights in favor of the aforesaid claimants as might hereafter be determined by the court, such determination not to affect title of the United States to the land; that on payment into the registry of the court in one monh from date of the sum of $46,500, fee should vest in the United States.

Under date of August 7, 1918, Cheney, Cheney's trustee in bankruptcy, the first mortgagees, the second mortgagees, the attaching creditor, the town of Hull, and Child and Turner all waived right of appeal from this decree. This determined finally the right of the United States to obtain title to the land by the payment of $46,500 only. This sum was thereupon paid into court, and title to the land vested in the United States. The case then stood for hearing before the District Court as to the distribution of this fund.

On February 7, 1919, the court made an order for the payment of $1,409.55 to the town of Hull; $13,882.05 to Snow et al., trustees of the first mortgage; $12,306.49 to Woodard, one of the second mortgagees; the balance, $18,901.91, to be paid to Cheney's trustee in

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bankruptcy, subject to the rights of the attaching creditor. The claims of Ross, Turner, and Child were disallowed. Ross' claim was disallowed on the ground that his $15,000 Cheney note had been paid by the application of part of the proceeds of Argonaut mining stock. Turner's and Child's claims were disallowed on the ground that the court, sitting as a substitute for a jury, had no equitable powers, and that therefore, although the court believed the claims to be reasonable and proper, it had no power to allow them out of the money in the clerk's hands. Hull and the first mortgagees have by agreement been paid, Woodard has not been paid, nor has the balance of $18,901.91 been paid into the bankruptcy court.

From this order of distribution Child and Turner appealed. Their assignments of error are each as follows:

"(1) The court erred in ruling that it had no power to recognize and enforce the equitable lien of the petitioner, and that its function was limited in the same way that a jury would have been limited, if no fund in court had been created by the efforts of the petitioner, with the agreement of the parties.

"(2) The court erred in ruling that notwithstanding the petitioner has a lien upon the fund in court, and that the amount of the petitioner's claim is proper, the court has no power to recognize or enforce such a lien in this case.

"(3) The court erred in directing that the entire remainder of the fund in court, after the payment of the claims of certain claimants other than the petitioner, be paid over to the trustee in bankruptcy of B. P. Cheney, thereby ruling, in effect, that while the court may allow the petitioner's claim in the bankruptcy case of B. P. Cheney, the same court has no power to allow it in this case."

Ross appealed, and also brought a writ of error. His assignments of error are that the court erred in its refusal to rule as follows:

"(1) That on the whole evidence the Ross note is covered by this security.

"(2) That the Ross note has not been paid.

"(3) That if Ross applied the dividends of the Argonaut stock to Carlisle's unsecured debts, and with knowledge of that fact Carlisle and Cheney agreed to pay the Ross note, Cheney assented to such application, and cannot now insist that the money be applied to the Cheney note.

"(4) That Cheney's agreement to pay this note on January 1, 1917, with full knowledge that Ross had applied the Argonaut dividends to Carlisle's unsecured debt, constitutes an acquiescence in such application and a modification of the agreement of June 12, 1913."

While the allowance of Woodard's claim in full is not in and of itself set up as error, yet if Child's and Turner's and Ross' claims should all be allowed, the fund would be inadequate to pay in full Woodard's claim. The appeals therefore involve the question of Woodard's share in the funds, if and in so far as the rights of the appellants, if established, may effect Woodard's interest. If Ross' claim is allowed, with interest from the date of the loan, no balance will remain subject to the claim of the J. R. Whipple Company. Under such conditions the real question is whether Child and Turner have claims in the fund superior to those of Woodard and Ross.

[4, 5] Was the fund paid into court subject to an attorney's lien to cover the proper fees and disbursements of Child and Turner? Federal courts recognize no lien at common law in behalf of an attorney

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beyond that given by the local law. 6 Corpus Juris, p. 766; Gregory v. Pike, 67 Fed. 837, 843, 15 C. C. A. 33. Turning to the local law, we find that Revised Laws of Massachusetts, c. 165, § 48, is as follows:

"An attorney who is lawfully possessed of an execution, or who has prosecuted a suit to final judgment in favor of his client, shall have a lien thereon for the amount of his fees and disbursements in the cause, but the provisions of this section shall not prevent the payment of the execution or judgment to the judgment creditor by a person who has no notice of the lien."

On its face, this statute would seem broad enough to cover proper counsel fees and not merely attorney's fees. But the statute has apparently been construed by the Massachusetts court as covering only the attorney's fees allowed in the bill of costs, thus distinguishing attorney's fees from counsel fees. See Blake v. Corcoran, 211 Mass. 406, 407, 97 N. E. 1002, and cases cited.,

[6] We must accept the interpretation put upon this statute by the Massachusetts court of last resort. Attorney's fees taxed as costs under the fee table applicable in this court are $20 each. But it is not entirely clear that a lien for these attorney's fees would lie against any interest other than that of Cheney. Gregory v. Pike, 67 Fed. 837, 843, 15 C. C. A. 33. Our decision as to the rights of the second mortgagees shows that Cheney had at this time no equity of any real value. We do not, however, for reasons hereinafter given, find it necessary to determine whether a lien for attorney's fees lies against the judgment.

Perhaps the claim of Turner and Child for a lien for their disbursements, aggregating $1,381.77, might, assuming that Cheney had a valuable interest in the property, or that the lien lies against the judgment without regard to Cheney's real interest therein, be maintained. The Massachusetts decisions on this point are not entirely decisive. Compare Sears v. Nahant, 215 Mass. 234, 102 N. E. 491, Ann. Cas. 1914C, 1296; Boston & Albany R. R. Co. v. Charlton, 161 Mass. 32, 36 N. E. 688; Burrage v. Bristol, 210 Mass. 299, 96 N. E. 719; Stewart v. Finkelstone, 206 Mass. 28, 38, 92 N. E. 37, 28 L. R. A. (N. S.) 634, 138 Am. St. Rep. 370; Stockbridge Iron Co. v. Iron Works, 102 Mass. 80, 89.

But this point, also, we find it unnecessary to determine. We advert to it only to make the ground of our decision, as hereinafter stated, entirely clear.

[7] It is also urged in behalf of Turner and Child that their fees may be charged against the fund under the principle recognized by the Supreme Court of the United States in Hobbs v. McLean, 117 U. S. 567, 582, 6 Sup. Ct. 870, 29 L. Ed. 940, and Trustees v. Greenough, 105 U. S. 527, 532, 26 L. Ed. 1157. See, also, Davis v. Bay State League, 158 Mass. 434, 33 N. E. 591. That principle is that:

"When many persons have a common interest in a trust property or fund, and one of them, for the benefit of all and at his own cost and expense, brings a suit for its preservation or administration, the court of equity in which the suit is brought will order that the plaintiff be reimbursed his outlay from the property of the trust," etc.

Doubtless there is a fairly close analogy between the cases in which this principle is asserted and the situation at bar. But we are not

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convinced that the principle is applicable. A part of the services of Turner and Child were rendered in the jury trial. This was a law suit. It was not a suit in equity. Compare Kohl v. United States, 91 U. S. 367, 23 L. Ed. 449; Cherokee Nation v. Southern Kansas Railway Co., 135 U. S. 641, 10 Sup. Ct. 965, 34 L. Ed. 295; Metropolitan Railroad Co. v. District of Columbia, 195 U. S. 322, 25 Sup. Ct. 28, 49 L. Ed. 219.

At the jury trial Turner and Child appeared nominally for Cheney. Cheney had not a common interest with the mortgagees and attaching creditor. He was, or was alleged to be, the debtor of all the other claimants. Although obviously insolvent, he had a right, perhaps a duty to his creditors, to take steps proper to insure a fair valuation of the property which the government contemplated taking. We therefore cannot hold that the services rendered by Turner and Child at the jury trial were rendered for the preservation or administration of a property in which Cheney and the claimants had a common interest.

Services rendered by Turner and Child after Cheney was adjudicated a bankrupt may, and we think do, rest upon a different basis, which will be hereafter referred to.

[8-10] But we think there is a plain and tenable ground upon which payment of these claims for fees and disbursements may be ordered out of this fund.

The District Court ruled:

"That the effect of the proceedings and the agreements of counsel in reference to the apportionment of the verdict between the different claimants was to substitute the presiding judge for the jury in the decision of those questions; that the payment of the value, as found by the jury, into court by the United States, was done with the assent of all parties in interest, for the simplification of the proceedings, and in order that the money might be readily available; that it was not intended to alter, and did not in any way alter, the rights of the parties from what they would have been, if a full and formal verdict apportioning the value among the different claimants had been returned by the jury at the trial.

"Upon the foregoing findings and rulings, I further rule that I have no power to allow counsel fees out of the money in the clerk's hands. If I had such power. I should unhesitatingly allow the fees and expenses of Mr. Child in the sum of $3,431.77 and Mr. Turner in the sum of $2,950, as, from my knowledge of the litigation, I believe them to be reasonable and proper. This is also the view of counsel for Mr. Woodard, for Mr. Ross, and for the attaching creditor, J. R. Whipple Company, who make no objections to said amounts.

"In my opinion the payment of these fees rests between counsel and client. As against Mr. Cheney, counsel would have their lien on the amount coming to him, and, there being no question as to the propriety of the amounts charged, this lien would not be lost by the substitution of the trustee in bankruptcy in place of Mr. Cheney."

Apart from other grounds, it is difficult to see how the court could be without power to allow counsel fees "out of the money in the clerk's hands," when, as the court found, it was the view of counsel of both the second mortgagees and of the attaching creditor that the claims were reasonable and proper, and that they made "no objection to said amounts." This falls little, if anything, short of being an express agreement, made in open court by the parties otherwise entitled

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to the fund, that these fees and disbursements should be paid therefrom. But if this language is not to be construed as a finding of such express agreement, then we think the District Court construed its power too narrowly. The proceedings before the court were not, as already indicated, legal. They were equitable. The distribution of this fund was a proceeding in equity. This is now conceded by all counsel. As already pointed out, it is immaterial, so far as the present questions are concerned, that a separate bill in equity was not filed and docketed as a suit in equity. Under no statutory or purely legal proceedings could any of the alleged rights of the attaching creditor have been considered. Nor could the conflicting rights of the second mortgagees accruing out of the alleged obligation to apply in payment the proceeds of other security have been left to the jury sitting to appraise the value of this land. The proceedings were equitable. Wood v. Westborough, 140 Mass. 403, 5 N. E. 613; Bates v. Boston El. St. Ry., 187 Mass. 328, 72 N. E. 1017.

As indicated above, if we enforced strict rules of procedure, all the parties would go out of court. None of them is in a position to assert the inapplicability of the equitable maxim that "he who seeks equity must do equity."

Our decision as to what rights Turner and Child have to compensation and reimbursement from this fund must turn mainly upon the acts of the parties subsequent to Cheney's adjudication in bankruptcy in January, 1918. The jury trial had during the previous summer determined no rights in the land nor in the fund, as a finality; its result was merely to indicate to the representatives of the government that the property could probably not be obtained, except at a very large increase over the value of about $22,000 placed thereon by the government's witnesses. After Cheney was adjudicated a bankrupt, all control of the proceedings by him or in his behalf of course ended. The trustee in bankruptcy, representing all creditors, secured and unsecured, took thereafter such control of the proceedings as did not belong to the mortgagees and the attaching creditor. Meddaugh v. Wilson, 151 U. S. 333, 342, 14 Sup. Ct. 356, 38 L. Ed. 183. Turner and Child, thereafter, acted for the trustee in bankruptcy, or for all parties prospectively interested in the fund, including themselves, in dealing with the government's representatives as to the bill of exceptions, and in negotiations which finally, by consent of all the parties, resulted in the agreed judgment of July, 1918. If the proceedings had followed the provisions of the Revised Laws of Massachusetts, c. 1, § 7, to the value determined by the jury as of July, 1917, would have been added "costs and reasonable expenses to be taxed by the court." B. & A. R. R. v. Charlton, 161 Mass. 32, 36 N. E. 688. Whether also interest would have been added is an arguable question. Cf. Burt v. Merchants Insurance Co., 115 Mass. 1.

In United States v. Nahant, 153 Fed. 520, 82 C. C. A. 470, this court held that:

"Where the United States in its sovereign capacity exercises its arbitrary power to condemn private property for necessary public use, the just compensation which it is required by the Constitution to make to the owner

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should be determined on equitable principles, and should be such as to put the owner in as good condition pecuniarily as he would have been if the property had not been taken."

But compare U. S. v. Weiner, 210 Fed. 832, 835, 127 C. C. A. 382.

Plainly this principle would require payment by the United States of Child's and Turner's claims, and perhaps interest from the date of the original petition, if we assume that the verdict represented only the fair value of the property.

We find it unnecessary to decide whether, if the government had in July, 1918, accepted the verdict, with all its legal incidents, and had paid the amount thus determined into court, pursuant to the written stipulation made on July 27, 1917, Child and Turner would or would not have been entitled to receive out of the fund, augmented by costs and expenses, their proper fees and disbursements. Cf. B. & A. R. R. v. Charlton, 161 Mass, 32, 36 N. E. 688; Blake v. Corcoran, 211 Mass. 406, 97 N. E. 1002. Obviously, as Cheney had not made the advances or paid for the services, if any allowance therefor had been added to the verdict of the jury, his trustee in bankruptcy would not have been entitled to receive the money. Such allowance, if made, would have belonged to Child and Turner, who had made the advances and rendered the services. For present purposes it is enough to note that a claim for such reimbursement and payment was fully justified, and, if insisted upon, might have ended the negotiations with the government's representatives and prevented the payment of the sum of $46,500 into court. Otherwise stated, Cheney's trustee in bankruptcy and Turner and Child at that time waived a substantial claim of right in order to bring about an accord between the representatives of the government and the other parties in interest, and thus to bring this fund into court, directly for the benefit of the claimants, and indirectly for the benefit of Cheney's unsecured creditors. The total result was that it was agreed that all the claimants should waive any rights and claims inconsistent with the acceptance of the verdict of $46,500, without interest, and without costs and expenses, and that a judgment should be entered upon this verdict as a basis of condemnation proceedings, so that title to the property might vest in the United States. Prior to the condemnation decree, both Turner and Child had by their petitions formally notified both the court and the other parties in interest that they would claim reimbursement out of the fund. It was in the face of this claim, and in order to get the fund into court for the common benefit of all parties for whom Turner and Child were then really acting (including themselves), that all of the claimants waived the right of appeal from the decree of condemnation and agreed to accept this fund as full satisfaction of all claims against the United States.

It is clear that Turner and Child did not, when they agreed that the fund, unaugmented by any allowance for costs and expenses, should be paid into court, intend to waive their claim for compensation out of the fund. Quite the contrary; for, before the decree was made they asserted their right to be paid out of the unaugmented fund. Whether the other claimants did or did not expressly, or in their own minds,

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assent to the contention thus made by Child and Turner, they accepted the benefit of the present payment of the fund into court, knowing that Child and Turner relied on that fund, unaugmented, for reimbursement and compensation.

On this state of facts we think that all the parties in interest then and thereby agreed that the court, as an equity court, should distribute the fund to the parties justly and equitably entitled thereto, including proper compensation to Turner and Child for their services in making the fund available. Cheney's trustee in bankruptcy, representing, in a certain capacity, all the creditors, concedes that the full amount of their fees should now be paid out of the fund in court.

Our decision is grounded on the peculiar facts of this case. The record is most extraordinary. Its unsual and anomalous character grows in part out of the ill-adapted and curious statutory proceedings then applicable in this district to land takings by the United States, in part out of Cheney's financial complications and the conflicting interests among his various creditors, and in part out of the failure of counsel to assert the claims of their clients in more orderly fashion. Counsel are all of experience and competency. We take the situation as we find it, dealing as best we may with this anomalous record. We conclude the court has power to do what ought to be done—order the payment from the fund of fees and expenses agreed by all to have been properly rendered and paid and of advantage to all parties in interest.

We repeat that we ground our decision upon the situation created by the acts and agreements of the parties. We think that Ross, Woodard, and the J. R. Whipple Company are, by their conduct, under the peculiar circumstances of the case, estopped to deny the right of Turner and Child to be compensated out of this fund.

In Meddaugh v. Wilson, 151 U. S. 333, 14 Sup. Ct. 356, 38 L. Ed. 183, the Supreme Court dealt with a case involving counsel fees, not unlike the one now at bar. The facts in that case are very complicated, and the opinion by Mr. Justice Brewer elaborate and lengthy. The case cannot be briefly stated. But the court there held, under conditions fairly analogous to those now presented, that counsel who had rendered services inuring to the benefit of the parties ultimately held entitled to the fund were in equity entitled to compensation out of the fund itself. That decision goes, as does our decision, upon the peculiar facts of the case—really upon the necessarily implied agreements and understandings of the parties.

The case in its complications and peculiarities also bears some analogy to that with which the court dealt in Edwards v. Bay State Gas Co. (C. C.) 172 Fed. 971, 976, et seq. In that case, dealing with the claims of counsel for services and disbursements in the intervening proceedings, the court grounded its allowance therefor upon a compromise decree which, as was there held, implied an agreement of the parties "to reimburse the services and disbursements of the counsel for the interveners in such sums as they might properly have charged their clients."

Our decision goes upon similar or analogous grounds.

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[11, 12] We come now to consider the claim of Samuel Ross. The record concerning the origin and nature of this claim is, if possible, even more confused and confusing than as to the Turner and Child claims; but analyzing it as best we may the controlling facts we find to be as follows:

In June, 1913, Carlisle & Co. were indebted to the appellant Ross for about $60,000 for money loaned for which his only security was some worthless "Pay as you enter car stock." They then had possession of two $15,000 notes made by Benjamin P. Cheney, one dated March 25, 1913, payable six months from date to the order of Carlisle & Co.; the other dated November 10, 1913, payable on demand after date to himself, and apparently indorsed by himself. Carlisle & Co. also had 30,000 shares of Argonaut Consolidated Mining Company stock.

On June 12, 1913, Carlisle & Co. sought to get a new loan of $30,000, and addressed a letter to O. G. Staples, Samuel Ross, and Henry F. Woodard, as follows:

"Gentlemen: This is to affirm that I have in possession and will place with you in the next twenty-four (24) hours, two (2) fifteen thousand dollar ($15,000.00) notes, made by Benjamin P. Cheney of Boston, and also to affirm that I am to pay off a loan now due by us in New York, which will release 30,000 shares of the Argonaut Consolidated Mining Company, which said stock I undertake to deliver in your hands not later than Saturday, June 14th; and I hereby agree that you shall have a specific lien on all of the above for an advancement of thirty thousand dollars ($30,000.00), this day made by the three of you to the firm of Carlisle & Co., in amounts as follows:

O. G. Staples	$16,009.50
Samuel Ross	7,389.66
Henry F. Woodard	6,600.84

"It is further understood and agreed that the Argonaut Consolidated Mining Company's stock, above mentioned, shall stand as security for the obligations of Carlisle & Co., due by Carlisle & Co. to the three gentlemen above mentioned, in the proportions above stated, and also for any other indebtedness due, or to become due, by Carlisle & Co. to the three aforesaid gentlemen.

"Very respectfully, A. H. Carlisle,
"Carlisle & Co."

The letter was not in terms acted upon. It has been treated by the parties as though formal written evidence. In some of the briefs it is referred to as a contract. Of course it was not a contract. The letter proposed that Staples should advance $16,009.50 of the contemplated $30,000 loan. For some reason now immaterial, Staples dropped out of the transaction entirely; but, as a result of negotiations of which this letter was only a part, Ross and Woodard agreed to advance and did advance each $15,000. Each received therefor one of the Cheney $15,000 notes and 15,000 shares of the Argonaut stock. Ross testified, and we find nothing in the record to contradict his testimony:

"That he advanced $15,000 to Carlisle & Co. on June 12, 1913, receiving as security 15,000 shares of the Argonaut Consolidated Mining Company and the $15,000 note of Mr. Cheney; that at that time Carlisle & Co. already owed him about $60,000 for moneys loaned for which his only security was pay as you enter car stock, which was worthless; that before he agreed to loan the additional $15,000 he stipulated that he should receive the Argonaut stock as collateral and that it should be security for the old loan; that he did not

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see Mr. Cheney in connection with the transaction, but that Carlisle had the Cheney notes in his possession."

The Cheney note that Ross took was indorsed by Carlisle & Co. It does not appear that for this $15,000 alone Ross had any other direct written promise by Carlisle & Co. to pay the $15,000 loaned them by Ross. But we fail to see on what theory any other obligation can in any aspect of the case be deemed necessary. The indisputable facts are that Ross loaned $15,000 to Carlisle & Co., taking as part of the transaction the Cheney $15,000 note indorsed by Carlisle & Co., as well as 15,000 shares of Argonaut stock. From time to time thereafter, Ross received $21,000 in dividends upon the Argonaut stock and applied these dividends in partial satisfaction of the old obligations of Carlisle & Co.

As already indicated, these $15,000 notes, when handed over by Carlisle & Co. in June, 1913, to Woodard and Ross, were not mortgage notes.

But under date of July 29, 1914, Cheney executed to Woodard and Ross a second mortgage on the premises in question. The material part of the condition of this mortgage is as follows:

"Provided nevertheless that if I, or my heirs, executors, administrators, or assigns, shall pay unto the grantees, or their executors, administrators, or assigns, the sum of thirty thousand (30,000) dollars with interest, as evidenced by two promissory notes of fifteen thousand (15,000) dollars each, bearing interest at the rate of 6 per cent. per annum, signed by me, one dated March 25, 1913, payable to Carlisle & Co., or order, and now held by said Samuel Ross, and the other dated November 10, 1913, payable to the order of myself, and now held by said Henry F. Woodard, in two years from this date, and shall also pay all costs and reasonable counsel fees incurred and to be incurred by said grantees in connection with the collection of said notes, and shall also pay said interest semiannually on said notes from their respective dates."

Although both of these notes were at the time of the execution of the mortgage overdue, the condition of the mortgage, it will be noted, was that they should be paid, with interest, in two years from the date of the mortgage, July 29, 1914.

The notes were not paid by July 29, 1916, and under date of October 19, 1916, the following agreement of extension was made:

"Whereas, under date of March 25, 1913, Benjamin P. Cheney executed his certain note for the sum of fifteen thousand dollars ($15,000) payable six months after date to the order of Carlisle & Co.; and whereas, at the maturity of the said note the same was duly protested for nonpayment;

"And whereas, on the 10th day of November, 1913, the said Benjamin P. Cheney executed his said note for the sum of fifteen thousand dollars ($15,000) payable on demand after date;

"And whereas, the said notes were thereafter secured by certain mortgages and deed dated respectively the 29th day of July, 1914;

"And whereas, it is the intention of the parties hereto to extend the said notes, so that the same will be due and payable on the 1st day of January, 1917:

"Now, therefore, in consideration of the sum of one dollar in hand paid to the said Benjamin P. Cheney by Henry F. Woodard and Samuel Ross, the said Benjamin P. Cheney hereby undertakes, promises, and agrees to pay the said notes on the 1st day of January, 1917, together with the accumulated unpaid interest thereon.

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"And in consideration of the sum of one dollar in hand paid to the said Carlisle & Co. by Henry F. Woodard and Samuel Ross, the said Carlisle & Co. hereby undertakes, promises, and agrees to pay the said notes upon the failure of the said Benjamin P. Cheney to pay the same.

"Witness the signatures and seals of the said Benjamin P. Cheney and the said Carlisle & Co. this 19th day of October, 1916.

"Benjamin P. Cheney. [Seal.]
"Carlisle & Co. [Seal.]"

Prior to this date of October 19, 1916, Ross had received in dividends from the Argonaut stock $15,000 and had applied the same in partial payment of the old obligations of Carlisle & Co. There is nothing in the record warranting the court in finding that this payment and application were not known and assented to by both Carlisle & Co. and Cheney, assuming, but without holding, that such knowledge and assent were necessary. Nevertheless, we find both Carlisle & Co. and Cheney on October, 1916, reaffirming their previous obligation to pay these notes, Cheney as principal and Carlisle & Co. as guarantor.

But the District Court ruled, on what ground we have difficulty on this record in understanding, that Ross' agreement with Carlisle & Co. clearly bound him to apply the dividends received on the Argonaut stock in the first instance to the indorsement of Carlisle & Co. on the Cheney note; that consequently these dividends, aggregating $21,000 in all, should be held as having paid the Cheney note, so that Ross was not entitled as second mortgagee to share in the fund now in court.

As above indicated, we regard it as error to treat the letter of June 12, 1913, as though a contract or a formal written offer, which, when accepted, even if orally, would constitute a contract. It was nothing but a part of the negotiations between Carlisle & Co., and Ross and Woodard for the $30,000 loan, which happened to be in writing. But, even if it were, as it is not, a contract or a written offer which by mere acceptance should be construed as a written contract, we find nothing in it requiring Ross to apply dividends received on the Argonaut stock primarily to the payment of the obligation of Carlisle & Co. on the Cheney note. The import of the paper seems to us almost exactly the reverse. By it Carlisle & Co. proposed to the contemplated lenders (then three) that the Argonaut stock should secure not only the new loan, but also "any other indebtedness due or to become due by Carlisle & Co. to the three aforesaid gentlemen." Ross was one of the "three aforesaid gentlemen." There was then "other indebtedness due" him of about $60,000. The proposition, therefore, was in plain and explicit terms that he should hold the Argonaut stock as security for this old debt. Of course he was entitled to enforce the Cheney note according to its terms against Cheney, the maker, and Carlisle & Co., the indorser. When, later, the Cheney note was secured by the second mortgage, Ross had the same right to enforce that mortgage security that he had to demand payment of the note from Cheney.

Otherwise stated, after Ross made the new advance of $15,000 to Carlisle & Co. on the security of Cheney's $15,000 note, and the 15,-

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000 shares of Argonaut stock, he became entitled to enforce for his aggregate loan of $75,000 all his security.

There is nothing either in the situation or in his agreement to deprive him of the usual right of a creditor holding security generally applicable to all his loans to apply the proceeds of any such securities primarily in satisfaction of debts not otherwise secured. Bankers' Surety Co. v. Maxwell, 222 Fed. 797, 802, 138 C. C. A. 345; George H. Sampson Co. v. Commonwealth, 208 Mass. 372, 375, 94 N. E. 473; National Bank v. Peck, 127 Mass. 298, 301, 34 Am. Rep. 368, and cases cited.

One obvious motive on Ross' part for making the new loan was to get, not only Cheney's $15,000 note, presumably then regarded as good, but also the Argonaut stock, as security for his otherwise unsecured $60,000 debt.

The nature of the transaction, as well as Ross' uncontroverted testimony, supra, "that before he agreed to loan the additional $15,000 he stipulated that he should receive the Argonaut stock as collateral, and that it should be security for the old loan," both require us to hold the District Court in error in holding Ross' $15,000 note paid.

Our conclusion is therefore that, when Ross received by way of dividend from the Argonaut stock $21,000, he was entitled to apply, as he did apply, this sum in diminution of the old debt of $60,000, without affecting his right to enforce the Cheney note and the mortgage for the full amount, with interest thereon, at the agreed rate of 6 per cent.

After the order of distribution made by the District Court on February 7, 1919, there was paid by agreement to the town of Hull and to the first mortgagees, in the aggregate, $15,291.60, leaving the fund now remaining to be distributed $31,208.40. Woodard's claim was allowed, including interest, in the sum of $12,306.49. From this we infer that a substantial payment had been made on account of Woodard's original claim, which was $15,000 of principal. How much of the sum of $12,306.49 was principal, and how much interest, does not appear.

The order of distribution made by the District Court must be vacated, and a new order of distribution made, under which the fees and disbursements of Turner and Child, aggregating $6,331.77, must be charged as prior in right to the claims of Woodard, Ross, and the J. R. Whipple Company. Whether Turner and Child are entitled to any interest, and, if so, from what date, and upon what amounts, has not been argued and cannot be determined on this record. Failing agreement on this point by the parties, the case may stand for further hearing on the question of interest before the District Court.

The decree disallowing the claim of Ross must also be reversed. We infer, although the record is not conclusive, that Ross has had no payment of interest on his new loan of $15,000 since it was made on June 12, 1913. Even without allowing him interest, the fund, after the payment of the amounts due Child and Turner, will apparently be inadequate to pay in full the amount due Woodard and Ross. The second mortgage, when given, secured them equally in equal sums. Any shortage now arising in the application of the proceeds of the

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security must therefore be borne equally. The case may stand, if necessary, for further hearing in the District Court upon the amount payable to Woodard and Ross, either or both, principal and interest, in accordance with this opinion.

In each case the decree of the District Court is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion, with costs in this court to the appellants.

(259 Fed. 755)

GARDNER v. GLEASON et al.

(Circuit Court of Appeals, First Circuit. June 18, 1919.)

No. 1386.

1. BANKRUPTCY ⚷227—REFEREE—PETITION TO REVIEW.
   Under General Order in Bankruptcy No. 17 (89 Fed. viii, 32 C. C. A. xix), it is the duty of a referee, where petition to review his order is filed, to forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon.
2. BANKRUPTCY ⚷467—APPEAL—QUESTION PRESENTED FOR REVIEW.
   On appeal by the trustee in bankruptcy from a decree of the Circuit Court, reversing an order of the referee as to the rent to be paid by the receivers for the use of property of which the bankrupt had possession, *held* that, under the assignments of error and the certification of the question for review by the referee, the only question for determination on appeal was the amount of rent which should be allowed the owners during the occupancy of the receivers, etc.
3. BANKRUPTCY ⚷255—CLAIMS—RENT.
   Neither the rent reserved in the lease, nor the rent which had been previously paid by the bankrupt as a tenant at will, are conclusive in determining what rental should be allowed the owners during the occupancy of their premises by the receivers; but evidence of the rent which had been previously paid, either under the lease or a verbal letting, may be of great assistance in determining what fairly and equitably ought to be allowed.
4. BANKRUPTCY ⚷255—EXPENSES OF PRESERVATION OF ESTATE—ALLOWANCE OF RENT.
   Where occupancy by the assignee of a bankrupt was of benefit to the estate, as the business was maintained as a going concern, rent for such occupancy should be allowed as one of the expenses in preserving the estate.
5. BANKRUPTCY ⚷255—CLAIMS—RENT.
   Where, after bankruptcy, receivers retained possession of the premises in which the bankrupt was carrying on business, for the purpose of disposing of the estate, *held*, that the amount of business transacted by the receivers could not be considered in determining the amount of rent to which the owners of the premises were entitled.
6. BANKRUPTCY ⚷255—ALLOWANCE OF RENT TO OWNERS OF BUILDING.
   The decree of the District Court, allowing the owners of property occupied by receivers in bankruptcy, who carried on the bankrupt's business, to recover for the period of occupancy at the same rate of rental as fixed under the lease, *held*, under the circumstances, warranted.

Anderson, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the District of Massachusetts; James M. Morton, Jr., Judge.

⚷For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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In the matter of the bankruptcy of the Crawford-Plummer Company. An order of the referee, fixing allowance of rent in favor of Albert A. Gleason and others, trustees, was reversed by the District Court (253 Fed. 76), and Charles G. Gardner, trustee in bankruptcy, appeals. Affirmed.

Asa P. French, of Boston, Mass., for appellant.

John J. Higgins, of Boston, Mass., for appellees.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

JOHNSON, Circuit Judge. This is an appeal from a decree of the District Court of Massachusetts vacating an order of the referee and determining the rent to be paid to the owners of a building on Washington street, in the city of Boston, during its occupation by a common law assignee and receivers in bankruptcy. The assignee occupied from April 18, 1916, to May 3, 1916, and the receivers from the latter date to July 31, 1916; so that the occupancy by both was for 3⅖ months.

The premises were leased in December, 1905, for a term of 10 years from January 1, 1907, to the George F. Quigley Company, a corporation of which Andrew Crawford was the treasurer, and this company had occupied the premises until 1909, when the bankrupt, the Crawford-Plummer Company, a corporation, of which the same Andrew Crawford was treasurer, took over its business and the possession of the premises, and paid rent to the owners in accordance with the terms of the lease. The record does not disclose any assignment of the lease to the bankrupt, nor any subletting to the bankrupt, nor any surrender of the lease and a verbal letting by the owners to the bankrupt, but does disclose that the bankrupt was in possession of the premises from some time in 1909 to April 18, 1916, and paid rent to the owners in accordance with the terms of the lease.

It appears from the summary of testimony before the referee that one of the representatives of the owners wrote to one of the receivers two days after their appointment, stating in substance that he had been informed that he and another had been appointed receivers of the Crawford-Plummer Company, and also:

"We would like to know what your plans are in regard to occupying the property."

To this the receivers replied that they expected to continue the business of the Crawford-Plummer Company in the Boston store, but did not know how long it would be advisable to continue the business as receivers, and that, if an arrangement could be made for new leases of the property, allowing them a reasonable time to vacate, it might be arranged to their advantage and that of the landlord. At this time it was evident that the receivers thought that the Crawford-Plummer Company were lessees of the property, because they state that, if they vacate the property, it would be—

"upon some arrangement disposing of the remaining portion of the term of the Crawford-Plummer Company's lease, and any proposition looking toward the surrender of possession of the Boston store and the purchase of the unex-

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pired portion of the Crawford-Plummer Company lease would be carefully investigated by us, and, if it seems to the advantage of the estate, we will at once seek the permission of the court to take advantage of the offer."

On May 16, 1916, Mr. Albert A. Gleason, with a Mr. Reid, both representing the owners of the premises, called upon one of the receivers to inquire their intentions in regard to remaining in occupancy of the premises and the rental to be paid, and, finding that they intended to remain for the present, Mr. Gleason told him the rental was $20,000 a year and taxes and repairs; that the taxes for 1915 were about $6,390 and said:

"If you remain in the premises we shall expect you to pay the same rental that the tenant paid."

To which the receiver replied:

"That he thought it was customary in such cases for the receivers to pay the same rental as had been paid by the tenant."

Mr. Gleason afterwards called upon the other receiver and gave him the same information in regard to the rental that had been paid by the bankrupt, and told him:

"That he thought that the fair value of the premises would be at the same rate that the tenant had paid."

Neither of the receivers was informed, however, in regard to the relationship of Crawford with the Quigley Company or the Crawford-Plummer Company. Although there was other correspondence between the representatives of the owners and the receivers, no agreement was made in regard to rental; but the receivers paid them $3,000 on account of the rent, stating that the balance would be left for future adjustment. The rental reserved in the lease was $20,000 per annum and all water rates and taxes which might be assessed upon the premises during the term and the cost of necessary repairs. The taxes for the year 1915 were $6,393, water rates during the occupancy by the assignee and receivers $30, and repairs $27.

The learned referee found that the reasonable rental value of the premises during the occupancy of the assignee and receivers was greater for a term of years than that reserved in the lease, but that for a temporary occupancy their rent might be as low as $100 per week. This finding, however, in regard to the value of the rental for temporary occupancy, was based upon the testimony of a real estate agent who had charge of the property, and who, after consultation with the owners, made an arrangement with the purchaser at auction of the balance of the goods which the receivers had been unable to sell, by which the purchaser might remain upon the premises, for the purpose of getting rid of the goods which he had bought, for a rental of $100 per week, which the agent said was the "usual price under such circumstances."

The agent, at the request of one of the guarantors on the lease, placed "To Let" signs upon the store before the occupancy by the assignee, and testified that he had received no satisfactory proposition to lease the premises down to the date of sale, and he testified:

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"I understood, of course, that while the 'To Let' sign was in the window, the occupants were merely tenants at sufferance, and that they were to remain only unless or until the owners got a satisfactory offer to rent the premises by lease."

There was no evidence that any such agreement had been made by the owners and the receivers, and the referee's finding, that it was understood that the receivers were to vacate the premises whenever a satisfactory offer to rent or lease was received by the petitioners, is only his conclusion from the above testimony. The referee has found that the assignee and receivers carried on the business in the store, and that it was of advantage to the bankrupt estate that the business be continued in the store which the bankrupt had occupied. He certified that, under all the circumstances, $1,500 a month, including water and repairs, seemed to him equitable and just rental for the premises, and that rent for 3⅖ months at this rate would amount to $5,110, and, deducting the amount already paid by the receivers on account, he found the balance to be $2,100, and ordered that sum to be paid.

[1, 2] Both the receivers and the owners of the premises petitioned the court to review this order of the referee, and it then became the duty of the referee, under General Order in Bankruptcy No. 17 (89 Fed. viii. 32 C. C. A. xix), to—

"forthwith certify to the judge the question presented, a summary of the evidence relating thereto and the finding and order of the referee thereon."

The only question certified by the referee was:

"What should be allowed for the rent of the premises occupied by the assignee and receivers from April 18, 1916, to and including August 1, 1916?"

And with this question he certified, as provided by the above general order, a summary of the evidence taken before him relating to the question which was presented.

The receivers, in their petition for review, assigned as the only reason for review that the order of the referee "was and is erroneous, in that said amount allowed is excessive."

There was, therefore, only one question presented to the learned judge of the District Court, and that related solely to the amount which should be allowed the owners as rent during the occupancy of the premises by the assignee and receivers. No other question is raised by the assignment of errors on this appeal. While it is true that the trustee has assigned as error "that the court erred in treating the case substantially as if it were one in which the bankrupt had held directly under the petitioners' lease," upon reference to the opinion of the court, however, it appears that he stated that "for the purposes of the present question, I think the case substantially the same as if the bankrupt had held directly under the lease"; the question being only the determination of the amount of rent which should be allowed. It does not appear from the certificate of the referee, or from the testimony which was filed with the court, or from the record of the case submitted to us on appeal, that the right of the owners to receive whatever rent should be allowed by the court was questioned.

In the argument of the case before us, however, the trustee under-

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took to question this right, and claimed that, as there was an outstanding lease running from the owners of the property to the George F. Quigley Company, the Crawford-Plummer Company was a subtenant at will of the George F. Quigley Company, and that until the expiration of the lease, or until some default creating a right to re-enter and take possession of the premises by the owners, the latter had no claim for rent, except against the Quigley Company. We do not regard this question as now open to the trustee, but that the sole question before us is what sum should be allowed.

The learned District Judge found the yearly rent to be $26,420, which evidently included $20,000 cash rental, taxes $6,393, and repairs $27. He thought that the referee had overemphasized the element of uncertainty in the tenancy of the assignee and receivers, as no pressure to vacate was ever put upon them by the owners or by the lessee, and that reasonable compensation should be paid for use and occupancy of the premises; that the rent reserved in the lease to the bankrupt was a fair measure of what the use and occupancy was fairly worth; that in the absence of an express agreement for a lower rental there is a presumption in favor of that sum; and that it will ordinarily be allowed, unless unusual circumstances appear making it plainly unreasonable. He also found there were no such circumstances in this case and that the ordinary practice ought to have been followed, and that the fact that the rent was large in comparison with the business carried on was a matter with which the owners were not concerned, and which ought not to diminish their rights, and ordered that the sum of $4,485.65 be paid to the petitioners. This sum was arrived at by adding to the cash rental of $20,000, paid under the lease, taxes for the year 1915, $6,393, and repairs amounting to $27, making the total yearly rental $26,420, or $2,201.66 per month, and the rental for 3⅖ months, the period of the occupancy by the assignee and receivers, $7,485.65, from which $3,000 paid by the receivers was deducted.

[3] We do not think the rental reserved in the lease, nor the rent which had been previously paid by the bankrupt as a tenant at will, are conclusive in determining what rental should be allowed the owners during the occupancy of their premises, for the preservation of the estate of the bankrupt; but evidence of the rent which had been previously paid, either under the lease or a verbal letting, may be of great assistance in determining what fairly and equitably ought to be allowed by the court to the owner as just compensation for such occupation. It was held in Fleming v. Noble, 250 Fed. 733, 163 C. C. A. 65, that where the rental reserved in the lease is a fair rental value of the premises occupied by the receiver, that should be awarded to the owner of the premises for the forced occupation of his premises, in the absence of any evidence of any agreement that a lower rental was agreed upon.

[4] The referee has found that occupancy by the assignee was of benefit to the estate, as the business of the bankrupt was maintained as a going business, and rent for such occupancy should be allowed as one of the expenses in preserving the estate. Randolph v. Scruggs,

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190 U. S. 533, 538, 23 Sup. Ct. 710, 47 L. Ed. 1165; Remington on Bankruptcy, vol. 1, p. 986.

[5] We do not think there was an error in the failure of the court below to treat as immaterial the amount of business done. If the premises occupied were too large for the business which was transacted, this was a matter to be determined by the receivers; and if they chose to occupy the whole of the premises without making any arrangement in regard to a lower rent, we do not think the rent should be made dependent upon their success, and see no reason why, if the sales were small, the landlord should not, on this account, be entitled to a fair rental for his premises.

In Kneeland v. American Loan & Trust Co., 136 U. S. 89, 103, 10 Sup. Ct. 950, 955 (34 L. Ed. 379), the court said that the receiver was liable for payment of a reasonable rental during his occupancy:

> "A rental not based on the use actuallly made by the receiver, but on the ordinary value of such property. * * * Such value is not to be determined by the amount of actual use, but by what, in the first instance and before the use had been had, would be adjudged a reasonable rental value."

[6] It would be most inequitable to interpret the agreement, made in the interest of the bankrupt estate to assist the receivers in obtaining as large a price as possible for the balance of the goods, as an admission that it was a fair rental value of the premises, while the assignee and receivers were conducting the business of the bankrupt. The fact that the receivers had already paid $3,000 on account of rent and wished to leave the balance for future adjustment conclusively proves that in their opinion the rent which it was agreed should be paid by the purchaser of a small remnant of the goods was not a fair measure of the reasonable rental during their occupancy. Although a "To Let" was placed upon the property some time in the early summer, the receivers were allowed to remain in possession of the premises as long as they desired, and interference with their possession would have been enjoined unless, upon application by the owners to the bankruptcy court, it should have ordered the receivers to vacate the premises. Under the order of the court they carried on the business in which the bankrupt had been engaged. They knew the rental which had been paid by the bankrupt, and that the owners expected them to pay the same rental during their occupancy, and did not surrender any part of the premises, nor make any arrangement to pay a lower rental.

We think that, where the rental which had been previously paid by the bankrupt, either under the terms of the lease or under a tenancy at will, is the fair rental value of the premises, the court, under all equitable considerations, ought to award this rental to the owner of the premises which are occupied for the preservation of a bankrupt estate, in the absence of any agreement for a lower rental or circumstances of an unusual nature that would render it inequitable, and we do not think there are such circumstances in this case.

The order and decree of the District Court is affirmed, with costs to the appellees.

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ANDERSON, Circuit Judge (dissenting). From both the opinion and the conclusion of the majority I am compelled to dissent. The result reached amounts to turning over the sum of $4,485.65, which, in my view, belongs to the general creditors of the bankrupt, to or for the benefit of Crawford, the bankrupt's treasurer, and Shea, the other guarantor of the lease.

The facts really controlling in the case seem to me to be disregarded in the opinion of the majority.

The owners of this building, trustees under wills, made a 10-year lease, ending December 31, 1916, to the George F. Quigley Company, of which Andrew Crawford was treasurer. Crawford and one Shea, both, so far as this record indicates, financially responsible, guaranteed performance by the lessee of all its covenants in the lease. The lessors were further secured by a $10,000 surety company bond. The original lessee went out of business in 1909. The Crawford-Plummer Company, now the bankrupt, succeeded to the business, and Crawford became its treasurer. The new company occupied the premises, and Crawford, apparently as treasurer of the new company, continued to pay the rent. As long as the landlords received their rent promptly and were not asked to release any of their rights under their old, well-secured lease, they were naturally content. As trustees under wills they were in duty bound to maintain all the legal rights of their estates. In their petition they have not alleged, nor is it now contended by them in argument, that the bankrupt was ever their tenant. The petition shows, as does the evidence, and as the District Court found, that the bankrupt occupied the premises as a tenant at will of the George F. Quigley Company. The petitioners stand, and properly, upon their rights, under the lease to the Quigley Company. There is nothing in the record warranting the inference that these owners have not long ago collected the full amount of the rent due under this lease. It was their duty to collect it.

It follows that whatever is received out of the bankrupt estate goes, not to benefit the owners, these petitioners, but to exonerate Crawford and Shea from liability otherwise accruing under their guarantee. They are the real parties in interest. The bankruptcy of the tenant at will of the lessee had, and could have, no effect whatever on the lessors' rights under their lease. There never was any privity between the owners and the bankrupt, or between the owners and the receivers.

When the Crawford-Plummer Company failed in April, 1916, the receivers at first assumed, not unnaturally, that the bankrupt was the lessee, and that consequently it was their duty within a reasonable time to elect whether to accept or renounce the lease. Bell v. American Protective League, 163 Mass. 558, 40 N. E. 857, 28 L. R. A. 452, 47 Am. St. Rep. 481; Railroad Co. v. Humphreys, 145 U. S. 82, 12 Sup. Ct. 787, 36 L. Ed. 632; In re Sherwoods, 210 Fed. 754, 757, 127 C. C. A. 304; Fleming v. Noble, 250 Fed. 733, 163 C. C. A. 65. Before they ascertained the real facts, $3,000 had been paid by the receivers to the petitioners. But all the negotiations between the receivers and the owners, as well as this payment, were grounded on a misapprehension of the legally significant facts. I am compelled to regard these negotia-

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tions, treated by the majority as of great, perhaps controlling, importance, as having nothing whatever to do with the real case.

As there was no leasehold which the receivers could accept or renounce, no question arises as to whether, pending decision, the rent reserved in the lease, or only a reasonable rent, should be allowed. Bell v. Am. Prot. League, supra; Fleming v. Noble, 250 Fed. 733, 735, 163 C. C. A. 65. The receivers had nothing to accept or to renounce. They were probably, as the referee and the District Court found, tenants at sufferance of the George F. Quigley Company. As there was no privity between the petitioners and the receivers, the petition should in my view on that ground alone be dismissed, even if from the bankruptcy estate further payments ought to be made for the use and occupation of the premises.

But the majority opinion holds that this issue is not open, that the point of no privity was raised too late by the receivers, and that the only question certified by the referee was "what should be allowed for the rent of the premises occupied by the assignee and receivers from April 18, 1916, to and including August 1, 1916."

As a matter of merely technical construction, to determine "what should be allowed" leaves it open to determine whether anything should be allowed. But even if there were, as I think there are not, technical difficulties in dealing with this case on its real merits, this court ought not, in my view, to give its approval to an obvious misapplication of a substantial part of this bankruptcy estate.

As already indicated, the petition of the owners was demurrable. The proceedings before the referee and before the District Court were, in effect, a mistrial. Undoubtedly counsel for the receivers was late in grasping the real situation and discovering that there was no warrant for making any payment to these petitioners. But the petitioners certainly have not been harmed by this belated ascertainment of the real facts. It is far from clear that they did not cause, or at any rate contribute to, the error and confusion. However that may be, the error below is now clearly apparent on the record. The issue is before this court. The responsibility must be taken by this court. The petitioners had, and have, no standing to claim anything from this bankruptcy estate.

But if we assume that by amendment the Quigley Company could be substituted for the petitioners, and that the question is broadly open as to what may justly and legally be allowed any party entitled thereto for the use of these premises, I think the result is the same; nothing is justly or legally due. $3,000 has already been paid for this occupancy of 15 weeks—$200 a week. The amount of the business done was about $40,000. To charge upon a bankruptcy estate a rent of about $7,500 for the sale of $40,000 of goods is obviously maladministration for which some one must be responsible. "Res ipsa loquitur." While the receivers were rather lax and careless, I do not think they can, on this record, be held responsible for such a waste of assets.

The referee found, and his finding is sustained by the District Court, that—

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"The rental value of the premises used only for temporary occupancy was perhaps as low as $100 a week. The receivers were tenants at sufferance, and it was understood that they were to vacate the premises whenever a satisfactory offer to rent by lease was received by the petitioners. * * * There was no agreement between the assignee and the owners, or between the receivers and the owners, or between the trustees and the owners, with reference to the amount of rent to be paid."

As the receivers did not undertake to agree for the payment of any such disproportionate rent, it is unnecessary to consider whether any such agreement, if made, could have, without the approval of the court, legally bound their estate.

Reasonable compensation for such temporary use and occupancy obviously depends upon the benefit to the occupant, or upon the sacrifice of the owners, or upon the combination or balancing of both factors. I think it clear that $100 a week fairly measured the sacrifice of the owners, including under that name the Quigley Company and Crawford and Shea, the guarantors of the lease; for it was as much as they could have gotten from any other occupant. I do not regard Redmond's announcement, who apparently acted for all parties in interest, that the purchaser might remain in possession after August 1 at a rental of $100 a week, as anything other than a business proceeding on the part of the persons who had these premises in the market to let. It was not a piece of philanthropy. It was an ordinary, businesslike attempt to get what they could out of the premises under very disadvantageous circumstances. It fairly tests the value of temporary use of the premises to would-be lessors, at that time and under the existing conditions. In all probability the premises would have been vacant until the end of the term on December 31, 1916, except for the occupancy of the receiver, and of the purchaser of the goods.

If, then, failing occupancy by these receivers, the premises would not have produced more than $100 a week—or even the $200 a week already paid to the owners, then the question of any further compensation for use and occupancy must be determined, at least in large part, by considering the value of the premises to the occupants. Such value obviously cannot be determined without paying some regard to the amount of business done upon the premises. It was, therefore, I think error for the court below to treat the amount of business done upon the premises as immaterial. As already indicated, premises used for the sale of $40,000 of goods cannot be of more than $3,000 benefit to a bankruptcy estate. The estate made no profit from the use of these premises to which the petitioners are justly entitled.

Otherwise stated, the owners of these premises were fairly entitled to receive from the bankruptcy estate, either what they could have gotten from some other occupant, or else the value of the premises to the bankrupt estate. They were entitled to nothing more. The fact that under a long lease with a going business the premises would have produced a rent largely in excess of the value for temporary occupancy is, while entitled to consideration, a fact of little—almost no—weight in the determination of the present problem.

Nor is there anything either in the decision or in the opinion in

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Kneeland v. American Loan & Trust Co., 136 U. S. 89, 10 Sup. Ct. 950, 34 L. Ed. 379, inconsistent with the view I now urge. That case arose out of foreclosure of a railroad mortgage and involved conflicting liens upon realty and personalty. The language quoted by the majority has absolutely no application to such a situation as is presented in this case.

Of course, rent reserved in a lease is evidence of a fair rental; sometimes and under some circumstances, almost conclusive of what is a fair rental; at other times, and under such circumstances as obtain in this case, of almost no weight.

There is another point on which I have the misfortune to differ from my Brethren. They refer to this occupation as a "forced occupation" —as though the Bankruptcy Court had power, and had used that power, to compel the owners or other persons legally entitled to the possession of the estate to turn it over for the use of the court's receivers. As I have already indicated, I think the facts in this case show clearly that the actual occupancy was with the assent of the parties legally entitled to possession and with an understanding that the receivers would move whenever a new tenant could be found.

But I am unwilling, even by implication, to assent to the doctrine that a court of equity or bankruptcy has power to requisition either real or personal property of third persons for use in liquidating bankruptcy assets. An equity court has no power of eminent domain, or anything analogous thereto. Of course private property may be appropriated to public use, reasonable compensation being paid therefor. The use of premises as a place of sale of bankruptcy assets is not a public use. No one would seriously contend that, however advantageous in the administration of bankruptcy assets, the court could compel one of our great department stores to give up a desirable part thereof for the sale of such assets. The fact that such assets, when seized by the court's receivers, are frequently located on premises in which the bankrupt has no continuing legal right, does not alter the nature of the problem. The owner of such premises has the same legal right to repossess himself of his property as has the owner of a department store to withhold the use of his premises. I can find no case decided by the Supreme Court of the United States, or by any other court of last resort, in which any such power has been sustained.

When there is a leasehold estate, it may or may not be the duty of the court's receiver to adopt it as an asset. Reasonable time for making such decision is a necessity of the situation. Pending such decision, if the receiver actually occupies, reasonable rent, or the rent reserved, must be paid. Bell v. American Protective League, 163 Mass. 558, 40 N. E. 857, 28 L. R. A. 452, 47 Am. St. Rep. 481; Fleming v. Noble, supra, and cases cited. If the lease is accepted, full rent is paid out of the estate. If the lease is renounced, the rights of the landlord against the original lessees are, as to subsequently accruing rent, unaffected. In re Sherwoods, 210 Fed. 755, 127 C. C. A. 304; In re Roth & Appel, 181 Fed. 667, 104 C. C. A. 649, 31 L. R. A. (N. S.) 270.

This is an entirely different proposition from that which underlies the intimated power of a court of equity to hold premises as against

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the legal rights of the owners, because they are convenient or advantageous in the liquidation of bankruptcy assets. No well-considered authority sustains any such revolutionary proposition. 3 Remington, Bankr. § 984, where two District Court opinions are cited in support:

In In re Chambers, Calder & Co., 98 Fed. 865, Judge Brown enjoined the landlord from bringing ejectment proceedings against the court's receiver, who had taken possession of a stock of goods on leased premises. This decision rests on the well-recognized doctrine that the enforcement of the landlord's alleged legal rights must be primarily sought in the court that had taken possession of the leased premises. Judge Brown says (page 866):

> "A court of quity, while giving the fullest recognition to a legal right, may so regulate the time and manner of its enforcement as not to cause unnecessary loss to others."

This doctrine, even if somewhat broadly stated, falls very far short of asserting a power of eminent domain in a bankruptcy court.

The other case which is commonly cited as an authority for this extraordinary proposition is In re Schwartzman, 167 Fed. 399, a decision of the District Court in South Carolina. But an examination of this case shows that it does not warrant the interpretation apparently put upon it in 3 Remington, Bankruptcy, 984.

The real decision in the Schwartzman Case was that the bankrupt was legally entitled to hold the premises until September, 1909, and that consequently the landlord should be enjoined from enforcing his erroneously claimed right of possession as of January 1, 1909. The decision was perfectly sound. It need hardly be remarked that any obiter dicta therein inconsistent with the decision as a whole, and with the current of authority elsewhere, are of no controlling weight.

Clearly Congress has never undertaken to vest in the federal courts having equity or bankruptcy jurisdiction power to seize and hold, as against the legal right of third persons, property convenient for the administration of bankruptcy or equity assets. No court, whose decisions are a binding or well-recognized authority, has asserted any such far-reaching doctrine. I do not think this court should even by implication commit itself to what I am compelled to regard as an unwarranted usurpation of power. This is a situation in which the axiom "equity follows the law" should be given full operation.

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(259 Fed. 766)

HUBER v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 5, 1919.)

No. 3267.

1. HOMICIDE ⟹112(2)—SELF-DEFENSE—PROVOCATION OF ATTACK.
If defendant, charged with homicide, was attacked in his own cabin by deceased, and forced back to his bunk, and thrown down upon it, and deceased choked him until he was "all in," or had reasonable ground to believe he was going to suffer great bodily harm, and that it was necessary to protect himself, he was justified in using all necessary means, even to the extent of killing deceased, though he, defendant, was wrong in throwing deceased's blankets out of the cabin and ordering him to get out, which started the difficulty.

2. HOMICIDE ⟹300(7)—SELF-DEFENSE—INSTRUCTIONS.
In a prosecution for homicide, instructions that if there was a mutual combat, during which defendant voluntarily shot and killed deceased, the plea of self-defense was not available, and that a mutual combat is one into which both parties willingly enter, *held* erroneous, in view of the testimony, as misleading.

3. HOMICIDE ⟹192—EVIDENCE—SELF-DEFENSE—AGGRESSION.
In a prosecution for homicide by shooting deceased, who attacked defendant after the latter had ordered deceased out of defendant's cabin after words had passed between them, evidence offered by defendant tending to show a state of ill feeling, which might have existed in the mind of deceased toward defendant during the next to the last month before the killing, *held* admissible on the issue of who was the aggressor in the difficulty.

In Error to the District Court of the United States for the Fourth Division of the Territory of Alaska; Chas. E. Bunnell, Judge.

Alois Huber was convicted of manslaughter, and he brings error. Reversed, with directions to grant new trial.

Louis K. Pratt, of Fairbanks, Alaska, and Herman Weinberger, of San Francisco, Cal., for plaintiff in error.

Annette Abbott Adams, U. S. Atty., and Frank M. Silva, Asst. U. S. Atty., both of San Francisco, Cal., and R. F. Roth, U. S. Atty., and Harry E. Pratt, Asst. U. S. Atty., both of Fairbanks, Alaska.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. To review a conviction of manslaughter for voluntarily killing Mat Schernthaner, Huber brought writ of error from the District Court for Alaska, Fourth Division, and in his assignments complains of certain instructions upon the law of justifiable and excusable homicide given to the jury by the trial court. Huber located Discovery placer claim and in 1915 built a small cabin (about 13x15 feet) on the ground. About March, 1915, he and Schernthaner entered into a written agreement to work the claim on a percentage basis with Schernthaner until December 31, 1917. There seems to have been an understanding that Schernthaner could occupy the cabin with Huber. The two men lived together and mined the ground profitably until September 3, 1917. Huber's evidence is that upon that day, while

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the two were at work in a cut, he complained of the manner in which Schernthaner was cleaning up the bed rock. Schernthaner answered with an oath and said:

"I have an interest in this ground here. I will do just as I please. You have no business to give me any orders."

Huber replied that he was only asking him to take the dirt out clean. Nothing more was said, and they continued working until that evening, when Huber, Schernthaner, and a neighbor named Cribbee, were in the cabin talking upon general subjects. Cribbee started to leave, when Huber asked Schernthaner to show his copy of their agreement to Cribbee. Schernthaner declined, whereupon Huber showed his copy to Cribbee, in order to have Cribbee "act as a referee" as to whether Schernthaner had any possible claim to the title. Schernthaner then said that he had never claimed any interest in the ground, and that Huber had misunderstood him, whereupon Schernthaner called Huber a liar, and accused him of having tried to make him (Schernthaner) lie about another matter at a previous time. Huber, who was then lying down on his bunk, got up and told Schernthaner that he must retract that charge or get out of the cabin. Schernthaner made some remark, whereupon Huber went over to Schernthaner's bunk on the other side of the cabin, took up some of the blankets, threw them out of the cabin, and was in the act of carrying a second pile of bedding to throw it out, when Schernthaner pushed Cribbee aside and grabbed Huber. We quote from Huber's testimony as to what next happened:

"Well, as near as I remember, it was around my left arm and here, and the other one he had under me, and he got me against the table first, and the table started to wobble over, and he got me against the bunk, and I had one arm—the blankets, I guess I dropped them—he had one of my hands pinioned; my left hand was pinioned, and with the right one I tried to hold him close to me. I had him around the neck with my right arm, and I tried to get his right arm. He had been hitting me several times against the ribs here. He pushed me against my bunk. He hit me several times with one fist, and with the other hand he finally got at my throat, this left hand; and I had one leg around him, around his leg a ways, and in doing that either I kicked over the table or he pushed it over with his back, and it was dark for a minute or two, and I seen his fist coming again. His head and shoulder was where it was dark, but I could see the blow coming, and I catched it again, and he got me by the arm, and finally got me on the bunk. I let go with my foot, and he got me on the bunk, on my bunk. * * * And he got in one good blow, and he got me on the bunk. And I noticed he had both hands on my throat then. I had one hand under me on the bunk, and I was laying partly on the bunk with my left leg, and my right was mixed up against his still, against his body, and it was dark at that moment. I reached back with my hand, and I got hold of this gun, and I made one jab at him. He was laying on top of me. He was choking me. My wind was shut off. As I say, when he got me by the gurgle, I grabbed this gun and makes one jab at him, or two jabs, and all at once I heard a noise, something like that, and he moved away from me. I felt his hands leave me and go back, and a little while later, as soon as he let me go, I was trying to get up, and just at that moment I seen him going through the door. * * * Q. What did you think when he was choking you there and you got your revolver—what did you think was going to happen to you? A. Well, I was scared for one thing, I guess. Q. What did you think about getting killed or badly hurt there—badly hurt? A. Well, I don't know as

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I was thinking anything, except I was all in. I know that. * * * The time he had me on the bunk with both his hands on my throat I was all in. I know that I got hold of this gun, and I made this one jab at him, or two jabs, and the second time I noticed by hand was caught somehow, and at the same time I heard this noise. I heard just a faint report. I have just a recollection. Q. At that time where was he standing? A. He was lying on top of me, standing over the top of me. I felt his hands leave me just when that— (Interrupted:) Q. And before that? A. It was on my throat. * * * Q. At that time you were all in, were you? A. Yes. Q. When did you commence to feel that weakness—was it before you got down on the bunk, or after you got down? A. No; I felt pretty weak when he got that second or third jolt in my ribs. * * *"

On cross-examination Huber said that he was afraid of Schernthaner, but that he did not think there was going to be a fight; that by throwing out his blankets he would be indirectly putting him out of the house; that he had the blankets in his hand when Schernthaner grabbed him, and that he then dropped the blankets; that he did not want to strike Schernthaner, or to choke him, as he wasn't looking for a fight; "all my object was to see him get out of there was all." He said he tried to catch Schernthaner's right arm and hold him, but that when he got down on the bunk Schernthaner got hold of his throat. He was asked how he was able to reach over between the pillow and the head of the bunk and get hold of his revolver, to which he replied that he was able to move his arm at that time, and got the arm free and "grabbed the gun to defend myself the way I could"; that he had put the revolver at the head of his bed, and remembered reaching back to get it in order to strike Schernthaner with something; that he did strike him at the time Schernthaner had him by the throat, and "when that shot went off I heard a noise something like that"; that he never invited Schernthaner out to fight with him at any time.

The evidence is that Huber was 40 years old, and suffered more or less from two ruptures, and that Schernthaner knew of the ruptures, because he had talked to Huber about them. The deceased was a young man in good health and a little heavier than Huber.

Cribbee, the only witness of the occurrences in the cabin, testified substantially: That he had examined the agreement heretofore referred to, and that he told Schernthaner that it did not disclose anything more than a mere working interest in the property; that then Schernthaner accused Huber of trying to make him lie about some work previously done, whereupon Huber called Schernthaner a liar; that Huber took the first pile of blankets and, after throwing them toward the door, took up another pile; that he thought Schernthaner said he would not get out; that deceased got up and brushed by him, and "they clinched right in here"; that he could not see which grabbed the other first because, when Schernthaner brushed past him, witness got up and got out of the way and walked toward the stove; that when he saw the men together they were on the bunk, Schernthaner on top of Huber; that somebody kicked the little bench over against the table and knocked off the lamp; that witness caught it, but it had not gone out entirely; that he thought the conflict lasted about two minutes; that he saw "hands working," but could not see the men distinctly, and heard the report; that then the deceased passed by him, holding his

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hands over his breast, and said he was hit; that he went outside the door and found that Schernthaner was dead; that he saw finger marks upon the throat of the defendant.

In charging the jury the court read the statute of Alaska which makes homicide justifiable when committed "to prevent the commission of a felony upon the property of such person or upon property in his possession, or upon or in any dwelling house where such person may be" (Comp. Laws Alaska 1913, § 1892), and makes homicide excusable when committed "by accident or misfortune in lawfully correcting a child, or in doing any other lawful act, by lawful means, with usual and ordinary caution and without any unlawful intent, or by accident or misfortune in the heat of passion, upon a sudden and sufficient provocation, or upon a sudden combat, without premeditation or undue advantage being taken, and without any dangerous weapon or thing being used, and not done in a cruel or unusual manner" (section 1893). Continuing, the court said:

"In the next instruction I will use the term 'mutual combat,' and I will now define it to you. A mutual combat is one in which both parties enter willingly. * * * If you find from the evidence in this case beyond a reasonable doubt that there was a mutual combat between the defendant and the deceased, during which the defendant voluntarily shot and killed the deceased, then the plea of self-defense is not available to the defendant. * * * The court instructs the jury that, where a person is unlawfully attacked by another at any place where he has a right to be, he is not required to retreat, but may stand his ground and defend himself, and continue such defense until he is entirely out of danger. So, also, the person attacked may safely act on the appearances of the situation as they appear to him at the time of the encounter, provided he acts as a reasonable man under the circumstances surrounding him, and if from such appearances he honestly believes that he is then and there about to suffer death or great bodily harm at the hands of his assailant he may lawfully take the life of such assailant in self-defense. In this connection it is the right and duty of the jury, in their deliberation upon the evidence, to put themselves as nearly as possible in the shoes of the defendant, and from his standpoint determine the question as to whether the appearances to the defendant were such as to cause him to honestly believe, acting as a reasonable man, that he was then and there about to be killed or suffer great bodily harm at the hands of the deceased.

"Applying the foregoing principles of law to the evidence in this case, if you find it to be true, or entertain a reasonable doubt whether or not it is true, that at the time and place stated in the indictment the deceased, Mathias Schernthaner, assaulted and struck the defendant in his cabin, and continued the assault to such an extent that the defendant, honestly believing, from the appearances then present and known to him, that he was then and there about to suffer death or great bodily harm at the hands of deceased, picked up his revolver, which was lying at the head of his bunk, and voluntarily discharged the same against the body of Schernthaner, causing his death, then defendant had a lawful right to defend himself with said revolver, and if in doing so the said Mathias Schernthaner met his death, it was justifiable homicide in self-defense, and you should find the defendant not guilty; and this same result follows, notwithstanding you may now believe from the evidence heard at the trial that the defendant was misled by such appearances, and was in no actual danger of losing his life or suffering great bodily harm at the hands of deceased. The age and relative size, strength, and physical prowess of both the defendant and deceased should also be taken into consideration by the jury."

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[1] While we think that Schernthaner was justified in believing he had a right to stay there during his term of his leasing agreement, it is perfectly plain that Huber was in his own cabin and had a right to remain there. If the defendant was telling the truth, Schernthaner was the aggressor in the actual physical fight, and if defendant was forced back to his bunk and thrown down upon it, and deceased was on top of him and choking him, and he really was "all in," as he expressed it, or had reasonable ground to believe he was going to suffer great bodily harm at the hands of the deceased, and that it was necessary to protect himself, the law would justify Huber in using all means necessary to defend himself, even to the extent, if reasonably necessary, of killing his assailant; and this would be true, notwithstanding the fact that Huber was wrong in throwing out Schernthaner's blankets and ordering him to get out of the cabin.

[2] Certain instructions which were given show that the court expressed substantially these views just outlined upon the law of self-defense. But we think that the jury might well have been misled by the previously given instructions that if there was a mutual combat, during which defendant voluntarily shot and killed Schernthaner, the plea of self-defense was not available, and that a mutual combat is one in which both parties willingly enter. It is to be remembered that Huber testified that he did not want or mean to bring on a fight and that his only purpose in throwing out the blankets was indirectly to put deceased out of the cabin. Granting always that Huber's conduct was wrong, still, according to his evidence, he had no intent to do Schernthaner any physical harm whatever, and under the testimony, when he threw the blankets out, he had no weapon upon his person, and made no threat of doing bodily injury to Schernthaner, and made no advance toward fighting. Under the circumstances, if Schernthaner, angered by the conduct of Huber, made a quick and felonious attack upon him, and Huber stood his ground where he rightfully was, and was willing to fight with him, but had no intention of doing him serious bodily harm, and Schernthaner continued his felonious assault, and backed him over to the bunk and got on top of him with intent to kill or to choke and injure him, and was in the act of doing him great harm, and Huber believed he was in danger of being killed or grievously hurt, and that to protect himself it was necessary for him to shoot his assailant, then we believe that he could avail himself of the plea of self-defense.

We do not mean to express an opinion upon the weight of the evidence, but under the testimony we think the court should not have charged that, if Huber willingly engaged in combat, the plea of self-defense was not available. In Gill v. State, 134 Tenn. 591, 184 S. W. 864, the defendant was convicted of voluntary manslaughter. The court charged the jury as follows:

"When one man invites another to combat, and the other accepts the invitation, and they both willfully engage in a mutual combat, and one of them slays the other in such combat, he cannot successfully invoke the law of self-defense, but would be guilty of at least voluntary manslaughter."

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The Supreme Court of the state said:

"The instruction in its effect, applied to the facts, holds that if one willingly entered into a mutual combat with another, without any intent to do great bodily harm, and thereupon his adversary resorted to a deadly weapon and was about to assault him therewith, he would not have the right to defend himself or resort to such a weapon in his necessary self-defense. Such is not the law."

Irvine v. State, 104 Tenn. 132, 56 S. W. 845, Daniel v. State, 10 Lea (Tenn.) 262, and other cases are cited. See, also, Rowe v. United States, 164 U. S. 546, 17 Sup. Ct. 172, 41 L. Ed. 547; Sowell v. State, 32 Tex. Cr. R. 482, 24 S. W. 504; People v. Hecker, 109 Cal. 451, 42 Pac. 307, 30 L. R. A. 403; State v. Berkley, 92 Mo. 41, 4 S. W. 24; State v. Doris, 51 Or. 136, 94 Pac. 44, 16 L. R. A. (N. S.) 660; Foutch v. State, 95 Tenn. 711, 34 S. W. 423, 45 L. R. A. 687.

In the last case cited there was a dispute as to who precipitated the conflict. The defendant contended that he did not bring about the trouble, and that he acted in self-defense, but that, if he were the aggressor, nevertheless he could not be precluded from relying upon the plea of self-defense, inasmuch as the deceased threatened him with such acts of violence as to imperil his life or to threaten him with great bodily harm, and that it was therefore justifiable in him to shoot in self-defense. The court said:

"It is true that such statements are to be found in many books; that if one be the 'aggressor,' or be 'in fault,' or 'provoke a difficulty,' he cannot rely upon the plea of self-defense. But such general statements are only true when taken in the limited sense in which they must be understood, and with the qualifications with which judicial utterances that gave them existence have guarded their application. In order to make a man guilty of murder, who is the 'aggressor,' or 'in fault,' or who 'provokes a difficulty' in which his adversary is killed, he must have provoked it with the intent to kill his adversary or to do him great bodily harm, or to afford him a pretext for wreaking his malice upon his adversary. * * * In order to deny to such party the right to rely on the plea of self-defense, it must appear that he was the 'aggressor,' or 'in fault,' or 'provoked the difficulty' in such way and with such intent as the law contemplates in the use of these terms. It is not every 'aggression' which produces a difficulty that is an unlawful one, within the meaning of this phrase, nor is it every 'fault' which a man might commit that precludes him from defending himself when violently assaulted or menaced, nor is it every 'provocation of a difficulty' which robs him of the right of self-defense."

The instruction heretofore quoted was misleading, for without qualification it deprived the defendant of the benefit of a defense which became vitally important.

[3] When the cause comes on for trial again we think that the court might properly admit the evidence which the defendant offered upon the last trial tending to show a state of ill feeling which may have existed in the mind of the deceased toward the defendant during July preceding the killing. It would serve to aid the jury in arriving at the truth of the material point as to who was the aggressor at the time of the affray in the cabin just before the killing occurred.

The judgment is reversed, with directions to the District Court to grant the defendant a new trial.

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(259 Fed. 772)

THE ERNESTINA.

BRAVO et al. v. ST. PAUL FIRE & MARINE INS. CO.

(Circuit Court of Appeals, First Circuit. June 18, 1919.)

No. 1382.

1. SHIPPING ⟹196—HARTER ACT—JETTISONED CARGO.
   Harter Act, § 3, relating to liability of vessel owners, does not exonerate a vessel owner from liability for general average contribution in respect to cargo jettisoned.
2. SHIPPING ⟹200—GENERAL AVERAGE—LIABILTY.
   A general average decree cannot be entered against vessel owners for items due cargo owners not parties to the record.
3. SHIPPING ⟹200—GENERAL AVERAGE—AMOUNT OF DECREE.
   A general average decree, including items in favor of cargo owners not parties to the record, is not cured by the alleged failure of defendant shipowner to obtain security from such cargo owners or to have a general average stated.

Appeal from the District Court of the United States for the District of Porto Rico; Hamilton, Judge.

Libel by the St. Paul Fire & Marine Insurance Company against the schooner Ernestina; Arturo Bravo and others, claimants. Decree for libelant, and the claimants appeal. Affirmed as modified.

Frank Antonsanti, of San Juan, P. R., for appellants.

Oscar R. Houston, of New York City (D. Roger Englar and Harrington, Bigham & Englar, all of New York City, Henry G. Molina, of San Juan, P. R., and Edward E. Blodgett and Blodgett, Jones, Burnham & Bingham, all of Boston, Mass., on the brief), for appellee.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

ANDERSON, Circuit Judge. This is an appeal by the owners of the schooner Ernestina from a decree of the District Court of Porto Rico holding the vessel liable for contribution in general average.

This vessel, seaworthy, properly manned, equipped, and supplied, sailed from San Juan, Porto Rico, November 27, 1917, laden with a general cargo of merchandise. On the next day, by reason of a violent storm and north winds, the schooner sprung aleak, and the master found it necessary and duly ordered a portion of the cargo jettisoned in order to lighten the ship and save it, together with the passengers and crew, from being a total loss. The vessel was saved. On a general average for the loss of the jettisoned cargo a decree was made against the vessel in the sum of $1,213.53 on account of the schooner and $40 on account of the pending freight, a total of $1,253.53.

[1] The chief contention of the appellants is that section 3 of the Harter Act (Act Feb. 13, 1893, c. 105, 27 Stat. 445, U. S. Comp. Stat. § 8029 et seq.) exonerates the vessel owner from liability for general average contribution in respect of cargo jettisoned, at least unless

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there is some fault or negligence on the part of the owner or crew, or unless there is some express contract to contribute to general average.

Apart from the Harter Act no question is made that the schooner would have been liable in general average. Section 3 of that act is as follows:

"If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy, and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel, nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service."

The appellants would construe the language of this section so broadly as to exempt the owner, under the conditions stated, from loss of every kind arising from dangers of the sea or acts of God. The loss in this case was unquestionably due to a peril of the sea.

No case deciding this exact question is cited or found; but, on principle, and on the fair implications of the decided cases, we think the contention unsound.

In Carver's Carriage by Sea (6th Ed.) § 103f, it is said that section 3 of the Harter Act does not "affect the obligation of the shipowner to contribute in general average to sacrifices of cargo," citing The Allianca (D. C.) 64 Fed. 871, a decision by District Judge Brown in the Southern District of New York in 1894. The questions chiefly discussed in that case did not arise under section 3 of the Harter Act; but the construction stated by this text-writer seems to have been assumed.

There is nothing to indicate that this construction has not been generally accepted by the admiralty bar during the 25 years since this decision. Such acquiescence would be an adequate reason for the absence of more plainly applicable and conclusive decisions.

The Harter Act is entitled "An act relating to navigation of vessels, bills of lading, and to certain obligations, duties, and rights in connection with the carriage of property." General average is not mentioned expressly or impliedly in its title.

It first came before the Supreme Court in the case of The Delaware, 161 U. S. 459, 16 Sup. Ct. 516, 40 L. Ed. 771, decided March 2, 1896. That case arose out of a collision in New York Harbor between a tug and the steamship Delaware. The steamship was held solely at fault (D. C.) 61 Fed. 525, but claimed to be absolved from liability by section 3 of Harter Act. On page 470 et seq. of 161 U. S. (16 Sup. Ct. 516, 40 L. Ed. 771) the court by Mr. Justice Brown discussed the act, saying that this was the first case in which it had been called to the court's attention. After stating the substance of the six sec-

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tions of the act, the court said (161 U. S. 471, 16 Sup. Ct. 522, 40 L. Ed. 771):

"It is entirely clear, however, that the whole object is to modify the relations previously existing between the vessel and her cargo. This is apparent, not only from the title of the act, but from its general tenor and provisions, which are evidently designed to fix the relations between the cargo and the vessel, and to prohibit contracts restricting the liability of the vessel and owners in certain particulars connected with the construction, repair, and outfit of the vessel, and the care and delivery of the cargo. The act was an outgrowth of attempts, made in recent years, to limit, as far as possible, the liability of the vessel and her owners, by inserting in bills of lading stipulations against losses arising from unseaworthiness, bad stowage, and negligence in navigation, and other forms of liability which had been held by the courts of England, if not of this country, to be valid as contracts, and to be respected even when they exempted the ship from the consequences of her own negligence. As decisions were made by the courts from time to time, holding the vessel for nonexcepted liabilities, new clauses were inserted in the bills of lading to meet these decisions until the common-law responsibility of carriers by sea had been frittered away to such an extent that several of the leading commercial associations, both in this country and in England, had taken the subject in hand and suggested amendments to the maritime law in line with those embodied in the Harter Act. The exigencies which led to the passage of the act are graphically set forth in a petition addressed by the Glasgow Corn Trade Association to the Marquis of Salisbury and embodied in a report of the Committee on Interstate and Foreign Commerce of the House of Representatives. As a part of the history of the times, this is a proper subject of consideration."

Then follows a long quotation from this report to the effect that steamship lines taking advantage of their practical monopoly have, through unreasonable and unjust provisions in bills of lading, exempted themselves from almost every conceivable risk and responsibility as carriers of goods. Of abuses thus originating several examples are given.

The court also said:

"The general words of the third section, * * * if detached from the context and broadly construed as a separate provision, would be susceptible of the meaning claimed, but when read in connection with the other sections, and with the remainder of section 3, they show conclusively that the liability of a vessel to other vessels with which it may come in contact was not intended to be affected.

"The first, second, fourth, and seventh sections deal exclusively with bills of lading and their covenants, and the third section, after using the general language relied upon by the respondent here, with regard to nonliability for faults or errors in navigation or in the management of the vessel, contains a further exemption of 'loss arising from dangers of the sea, or other navigable waters, acts of God or public enemies, or the inherent defect, quality or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or from loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to safe life or property at sea, or from any deviation in rendering such service.' These provisions have no possible application to the relations of one vessel to another, and are mainly a re-enactment of certain well-known provisions of the common law applicable to the duties and liabilities of vessels to their cargoes. The fact, too, that by section 6 the various sections of the Revised Statutes, which embody the limited liability act, are preserved unimpaired, would seem to indicate that the later act was not intended to receive the broad construction claimed."

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If, in The Delaware, the court had adopted the broad literal construction of section 3 that we are now asked to place upon it, a reverse result would have been reached. The words of section 3, providing that the owner who has shown due diligence shall not "be held responsible for damage or loss resulting from faults or errors in navigation," might be construed broadly enough to cover damage done by a collision resulting from errors in navigation; but the court did not put this broad literal interpretation upon the act. This decision is nearly, perhaps quite, conclusive against the appellants' contention. Cf. The Silvia, 171 U. S. 462, 19 Sup. Ct. 7, 43 L. Ed. 241; Crooks & Co. v. Allan, 5 Q. B. D. 38, 40; Schmidt v. Royal M. S. S. Co., 45 L. J. (Q. B.) 646.

In The Carib Prince, 170 U. S. 655, 18 Sup. Ct. 753, 42 L. Ed. 1181 (May 18, 1898), the Supreme Court held that the Harter Act did not of itself relieve the shipowner from liability for unseaworthiness, even though he had in fact exercised due diligence to make his ship seaworthy. The court reaffirmed the doctrine of The Caledonia, 157 U. S. 124, 15 Sup. Ct. 537, 39 L. Ed. 644, to the effect that exceptions in a bill of lading, if possible. ought to receive "a construction not nullifying or destroying the implied obligation of the shipowner to provide a ship proper for the performance of the duty which he has undertaken." The act was thus rather strictly construed.

Compare also Carver's Carriage by Sea, § 103f; The Chattahooche, 173 U. S. 540, 19 Sup. Ct. 491, 43 L. Ed. 801; The Kensington (D. C.) 88 Fed. 331; Id., 94 Fed. 885, 36 C. C. A. 533; Id., 183 U. S. 263, 22 Sup. Ct. 102, 46 L. Ed. 190; The Southwark, 191 U. S. 1, 24 Sup. Ct. 1, 48 L. Ed. 65.

The next important decision after the Delaware was The Irrawaddy, 171 U. S. 187, 18 Sup. Ct. 831, 43 L. Ed. 130 (May 1898).

The owner of the Irrawaddy had exercised due diligence to make his vessel in all respects seaworthy and properly manned, equipped, and supplied. She was stranded by the negligence of her master. Thereafter there was jettison of a portion of her cargo, as well as sacrifices and losses incurred by her owner in order to save the ship and cargo. The contention of the owner was that, on general average, he was entitled to contribution for the sacrifices made by him in these successful efforts to save vessel, freight and cargo.

This contention was not sustained. The court said by Mr. Justice Shiras (171 U. S. 192, 18 Sup. Ct. 833, 43 L. Ed. 130):

> "Plainly the main purposes of the act were to relieve the shipowner from liability for latent defects, not discoverable by the utmost care and diligence, and, in event that he has exercised due diligence to make his vessel seaworthy, to exempt him and the ship from responsibility for damage or loss resulting from faults or errors in navigation or in the management of the vessel. But can we go further, and say that it was the intention of the act to allow the owner to share in the benefits of a general average contribution to meet losses occasioned by faults in the navigation and management of the ship."

The first part of the above quotation must, of course, be construed in the light of the decision just before made in The Carib Prince, supra, and the subject-matter to which it related. So construed, it means that the Harter Act empowers the shipowner by contract to relieve

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himself from liability for latent defects not discoverable by due diligence.

Certainly in this decision the court showed no disposition to extend the operation of the act beyond its plainly necessary application.

In the case of The Strathdon, a closely analogous question arose before the District Court for the Eastern District of New York, in April, 1899 (94 Fed. 206), District Judge Thomas held that the fire loss then in question was due to the negligence of the crew, that although, under section 3 of the Harter Act, the owners were exempt from liability for damage to the cargo resulting from a fire due to the negligence of the crew, yet that the shipowners could not maintain affirmative action against the cargo owners for contribution in general average to the ship's loss. Also that when the ship's owners were invited to such an adjustment by the cargo owners, the ship's loss must be taken into consideration, as the effect of excluding it would be to make the same act for which the vessel owners are acquitted of responsibility by the statute the basis of an indirect recovery for part of the damage which was in issue in the direct action. Judge Thomas said:

"It is true that under the Irrawaddy Case the carriers could not affirmatively demand contribution, because, notwithstanding the exculpation from the payment of damages for the loss of cargo accorded them by the fire and Harter acts, they are deemed guilty of constructive negligence when they seek to recover contribution for the ship's losses. But this imputed negligence does not exempt them from an action for contribution in general average at the instance of the cargo owner for cargo loss. The cargo owner has such action if the carriers be free from such imputed negligence; and can it be asserted logically that the carriers, when free from negligence, are liable to the cargo owners, but that this liability is discharged because the carriers are negligent, and such negligence caused the loss? According to such a contention, it is better to be negligent than unoffending. By it the carrier may plead his own wrong to escape an obligation that would be due from him, if he were without fault."

In the Court of Appeals (Wallace, Lacombe and Shipman) this part of Judge Thomas' decision was sustained (101 Fed. 600, 604, 41 C. C. A. 515), although that court held (for present purposes immaterial) that the District Court was in error in its view that the fire was caused by negligence of the crew. There is nothing in this case supporting the appellant's contention.

The only other leading case in which the courts have discussed the effect of the Harter Act upon general average is that of The Jason, which was, as to the facts, practically on all fours with the Irrawaddy Case, except that in the case of The Jason the bills of lading provided in effect that if the shipowners "shall have exercised due diligence to make said ship in all respects seaworthy, and properly manned, equipped, and supplied," then in case of danger, damage, or disaster resulting from (inter alia) negligent navigation, the cargo owners shall not be exempted from liability for contribution in general average, but with the shipowner shall contribute as if such danger, damage, or disaster had not resulted from negligent navigation. The case originated in the District Court for the Southern District of New York, and Judge Hough wrote an able and interesting opinion (162 Fed. 56), discussing the application of section 3 of the Harter Act, holding that

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it did not affect the right of the cargo owner to general average contribution from the vessel. In the Court of Appeals for the Second Circuit (178 Fed. 414, 101 C. C. A. 628), the court (Lacombe, Coxe and Ward) held that section 3 is not to be construed so broadly as to entitle a vessel owner to collect a general average contribution from the cargo owner on account of expenditures incurred for the salvage of vessel and cargo after stranding through faults and negligence in navigation, and that a provision in the bills of lading giving it such right is invalid. The case was then certified on certain questions to the Supreme Court (225 U. S. 32, 32 Sup. Ct. 560, 56 L. Ed. 969), where it was decided in May, 1912. The Supreme Court held the provision in the bill of lading entitling the vessel owner under such circumstances to claim contribution in general average to be valid.

The court by Mr. Justice Pitney said:

"Prior to the Harter Act it was established that a common carrier by sea could not by any agreement in the bill of lading exempt himself from responding to the owner of cargo for damages arising from the negligence of the master or crew of the vessel. Liverpool & G. W. Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 438 [9 Sup. Ct. 469, 32 L. Ed. 788], following New York C. Railroad Co. v. Lockwood, 17 Wall. 357 [21 L. Ed. 627]."

But the court held that the public policy underlying these decisions was subject to change by Congress, saying:

"In our opinion, so far as the Harter Act has relieved the shipowner from responsibility for the negligence of his master and crew, it is no longer against the policy of the law for him to contract with the cargo owners for a participation in general average contribution growing out of such negligence; and, since the clause contained in the bills of lading of The Jason's cargo admits the shipowner to share in the general average only under circumstances where by the act he is relieved from responsibility, the provision in question is valid, and entitles him to contribution under the circumstances stated."

Mr. Justice Pitney states the result of the Irrawaddy decision as follows:

"The point of the decision in The Irrawaddy (and as an authority the case goes no further) is that while the Harter Act relieved the shipowner from liability for his servant's negligence, it did not of its own force entitle him to share in a general average rendered necessary by such negligence."

In both these leading cases—The Irrawaddy and The Jason—the discussion turned in large part upon the effect of the Harter Act in changing the public policy of the nation concerning contracts limiting the liability of carriers for the negligence of their servants. Compare The Southwark, 191 U. S. 1, 6, 24 Sup. Ct. 1, 48 L. Ed. 65. But neither case presented the exact question now involved of the right to general average by the cargo owner against the vessel owner for loss suffered from a peril of the sea or from an act of God, exemption from which (on the part of the carrier) by contract was never obnoxious to the public policy of the United States as declared by the earlier decisions of the court. See The G. R. Booth, 171 U. S. 450, 19 Sup. Ct. 9, 43 L. Ed. 234, and cases cited.

Clearly, the chief purposes of the Harter Act were to authorize or effect substantial changes in the relations between vessel owners as

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common carriers and cargo owners as shippers. But we are unable to believe that this act was intended to work a radical change in the relations of coadventurers arising out of a voluntary sacrifice in the common interest in order to save the ship and remaining cargo from a peril of the sea or from an act of God. The general principles underlying general average seem to us to put such a case as the one at bar, where no negligence, actual or imputable, is involved, outside the scope of the Harter Act. Ralli v. Troop, 157 U. S. 386, 15 Sup. Ct. 657, 39 L. Ed. 742. We find it impossible to believe that Congress intended to make it possible for the captain of a ship to sacrifice all or a large part of the cargo in order to save his ship, without any obligation on the part of the saved ship to contribute to the loss of the cargo owner. Only plain and unmistakable language would warrant a court in inferring a legislative purpose so inconsistent with the fundamental principles both of general average and of common carrier duty.

The decision of the court below that the Harter Act has no application to this case must be affirmed.

[2] The appellant's third assignment of error is as follows:

"The court erred in rendering a decree for the full amount claimed in the libel, because the testimony conclusively showed that the libelant had charged in its general average statement items which, if due at all, were admitted to be due to other parties who were not litigants in the cause or represented therein."

Although the record is, on this point, not as clear and satisfactory as it should be, we think the appellant's contention must be sustained.

In its libel the appellee contends that "as an insurer of a part of the cargo jettisoned it was obligated to pay, and has paid, the sum of $2,063.63." The libelant's witnesses testified that "the ship would be liable for about 25 per cent. of that sum, or $440." The difference between this sum of $440 and the amount $1,253.50, for which the court below entered a decree against the vessel is claimed to accrue for the benefit of other cargo owners, not parties to this record. There is nothing in this record indicating that these other cargo owners make any claim, or to show that the appellant may not have, by private negotiation, already adjusted with them.

[3] In effect the appellee's counsel admit that this contention is well based, and that "the libelant can only recover the contribution due in respect of its own interests, and cannot recover contribution in this suit which belongs to other cargo owners or underwriters." But the appellee claims that this error is more than offset by another alleged error in favor of the appellants. This alleged offsetting error consists in the failure of the shipowners to take proper steps to obtain security from the cargo owners, or to have a general average stated. While such failure on the part of the shipowners might ground a claim in favor of any cargo owners injured thereby, it has no bearing upon the appellants' contention that in this case a decree cannot be made in favor of parties not in court. See Carver on Carriage of Goods by Sea, § 42; Crooks & Co. v. Allan, 5 Q. B. D. 38; The Santa Ana, 154 Fed. 800, 84 C. C. A. 312.

Even this contention of the appellee's is apparently not insisted upon, for counsel in their briefs say:

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"The appellee, however, does not press its right to affirmative relief because of the fact that the other cargo owners were all domiciled in Porto Rico and can probably be made to respond to their respective proportions of general average without serious difficulty."

The third assignment of error must be sustained. The decree below should be modified by substituting the sum of $440 for the sum of $1,253.50, and, so modified, it may be affirmed, with costs to the appellants in this court.

The decree of the District Court is modified by substituting the sum of $440 for the sum of $1,253.50, and, so modified, is affirmed; and the appellants recover costs in this court.

(259 Fed. 779)

BALCOM v. UNITED STATES.*

(Circuit Court of Appeals, First Circuit. June 18, 1919.)

No. 1390.

CRIMINAL LAW ⟹762(3)—INSTRUCTIONS—OPINION ON TESTIMONY.

For the judge to direct the jury's attention to certain lines of investigation and inquiry that might test the question whether a letter introduced by defendant to discredit government's witness was fabricated, even if implying the judge had an opinion thereon, was not error; he expressly leaving to them determination of whether to follow such lines, and, if they did so, what weight should be given to inferences so drawn, and telling them to disregard any opinion expressed by him.

In Error to the District Court of the United States for the District of Rhode Island; Arthur L. Brown, Judge.

Frederick O. Balcom was convicted of violation of the Espionage Act and brings error. Affirmed.

William M. P. Bowen and George F. O'Shaunessy, both of Providence, R. I. (Washington R. Prescott, of Providence, R. I., on the brief), for plaintiff in error.

Harvey A. Baker, U. S. Atty., of Providence, R. I.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

JOHNSON, Circuit Judge. Frederick O. Balcom, the plaintiff in error, hereinafter called the defendant, was indicted and convicted in the United States District Court for the District of Rhode Island for violation of title 1, § 3, of the act of Congress of June 15, 1917 (40 Stat. 219, c. 30) as amended by Act May 16, 1918, c. 75, § 1, 40 Stat. 553, and known as the Espionage Act (Comp. St. 1918, § 10212c), which, among other things, makes it an offense to—

"willfully make or convey false reports or false statements, or say or do anything except by way of bona fide and not disloyal advice to an investor or investors, with intent to obstruct the sale by the United States of bonds or other securities of the United States or the making of loans by or to the United States."

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*Certiorari denied 250 U. S. 669, 40 Sup. Ct. 14, 64 L. Ed. —.

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The defendant was charged in the first count in the indictment with committing this offense on the 21st day of June, 1918, at Providence, in the state of Rhode Island, by willfully making and conveying the following false reports in the presence of Florence H. Breslin and divers other persons, with the intent to obstruct the sale by the United States of bonds and securities of the United States and the making of loans by the United States, viz.:

"When you women learn that when you stop paying for wars, you will have no wars. The United States Liberty Bonds are not worth the paper they are written on. When it comes time for the government to redeem your Liberty Bonds, they will have no money to give you. Then they will make some law to cover that, and then what are you going to do about it? Liberty Bonds, Thrift and War Stamps are just so much scrap paper; you might just as well throw your money in the wastebasket."

The only error assigned relates to a portion of the charge of the presiding judge to the jury in which he commented upon certain testimony of the defendant.

In support of the count in the indictment upon which the defendant was convicted Florence H. Breslin, in whose presence the defendant was alleged to have made the statements with which he was charged, was a witness. The defendant, for the purpose of discrediting her testimony, testified in his own defense that in May or June, 1918, she called at his office and requested him to perform a criminal operation upon her sister, Eva Breslin, who she stated was seven months pregnant; that she told him that a certain married man was responsible for her sister's condition and would pay the bill; that the defendant refused to perform the operation, and that Miss Breslin thereupon told him that he might be sorry. He also testified that on July 8, 1918, he received the following blackmailing letter signed "F. C.," which was placed under his door by some person to him unknown—

"July 8. Dear Sir:—If I remember correctly, I have heard you make some disloyal statements. I am at present in need of $500. If you will meet this emergency, I can easily forget our differences. A good meeting place will be the park entrance on Broad street, near Miller avenue, on the Wednesday following this date, at 10 a. m. You will probably remember me when we meet and will need no introduction.

"Very truly, F. C."

In commenting upon the testimony of the defendant in relation to the alleged threat and the letter, the court charged the jury as follows:

"If a charge of this kind was to be made, would it not be natural to have investigated and made a thorough search as to the acquaintance and relationship of the persons who were charged to be participants in this attempt at a criminal operation? If there was a likelihood of a case of blackmail following a matter of this kind, would not the natural thing have been to have made an investigation, to have called the matter to the attention of attorneys or the police, and to have had the thing run down and all of the matter examined? There is no testimony in this case of that character, or anything to indicate the intimacy of these people. It all rests upon the question of what the doctor says he was told."

This instruction is the only error assigned.

The defendant contends that this statement was not only argumentative, and likely to mislead the jury as an expression of opinion by the

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presiding judge, but also that it was a statement that the law required the defendant under the circumstances to do the things which the court stated there was no testimony in the case that he had done. We can find no basis for this contention in the instruction which was given, nor do we think that the jury could have possibly understood that they were, as a matter of law, to find that any course of conduct under the circumstances was to be pursued by the defendant. Clearly the presiding judge was only attempting to call the attention of the jury to the consideration of whether or not certain inferences might naturally be drawn from the admitted failure of the defendant to do certain things.

An important part of the testimony offered by the United States to sustain the charge against the defendant was Miss Breslin's, and if her credibility could be destroyed by showing that she was the author of the blackmailing letter, the case against the defendant might have failed.

It was not reversible error for the court, under the circumstances, to direct the minds of the jury to certain lines of inquiry as to whether the testimony of the defendant in regard to the receipt of the letter was fabricated or not. This the court did in the form of questions, and did not intimate any opinion further than appears by them. Even if the questions implied that in their statement the court had an opinion in regard to answers which a reasonable mind would return to them, this would not constitute reversible error, as has been settled by numerous decisions in the federal courts, with the qualification in all of them that the court must make clear to the jury that the ultimate decision upon all questions of fact rested with them, irrespective of any opinion which the court might entertain. This is well established and does not need the citation of any authorities; but they are collected in Morse v. United States, decided in the Fourth Circuit and reported in 255 Fed. 681, 167 C. C. A. 57. In several places in the charge the presiding judge forcibly impressed upon the jury that they were the sole judges of the facts and of the credibility of the witnesses.

As bearing upon the credibility of Miss Breslin as a witness, the minds of the jury were directed by questions of the court, as will appear from other parts of the charge beside that which is assigned as error, to the circumstances surrounding her alleged visit to the doctor's office and the testimony of the doctor in regard to the receipt of the blackmailing letter. In regard to the letter the jury were instructed:

"The next thing which appears in the case is a letter, which the doctor says was put under his door; his wife says the door of the office. You have seen that letter, gentlemen, and you have heard the testimony; a blackmailing letter, because it is blackmail to try to extort money from a person by intimation or threat of criminal prosecution. Was it a likely act, a probable act, following from such a refusal—an attempt to blackmail on another ground, and to extort money?

"As to the history of that letter, as to its appearance, the first testimony in the case, and the only testimony as to its first appearance on earth, is the testimony of the doctor and his wife that it appeared on the floor of the office. There is no postmark. There is nothing on the envelope to indicate that it came through the post office, and you may infer, I presume, from that fact,

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that it must have come from some messenger. Did it come from the person who had been in asking for this operation? The testimony in the case is that on the 27th or 28th of June this person received a serious injury, which, according to the witness' testimony and that of her sister and physician, absolutely incapacitated her from leaving the house, so that during all this period she was an invalid.

"If that letter did not come from this person (the initials F. C. correspond to the name of this witness), whence did it come? If it is not accounted for by any previous action of this person, how can you give it any influence whatever, gentlemen, as affecting her credibility? And that is its only legitimate purpose in this case."

In another part of the charge the court stated to the jury:

"I will add to that, gentlemen, that the court is not to decide upon the facts. I have expressed to you, and intend to express to you, nothing as to my personal opinion of the case; and if I have stated anything which might indicate to you what my opinion is, you will disregard it and make up your own opinion. The judges of this court have the power, if they see fit, to state their opinions on the facts, leaving the jury the full right to determine upon the facts."

An issue was raised by the defendant in regard to the credibility of the government's witness by the introduction of the letter in question, which the government claimed had been fabricated; and this in turn became an important issue at the trial as bearing upon the issue of credibility.

We think it not reversible error for the presiding judge to direct the attention of the jury to certain lines of investigation and inquiry that might test the question whether the letter was fabricated, leaving, as the court did leave, solely to the jury the determination of whether they would follow such lines of inquiry and investigation, and, if they did so, what weight should be given by them to the inferences that might be drawn from the admitted or proven facts.

We think that, taking the portion of the charge which is assigned as error, in connection with the whole charge, and particularly that portion in which the court impressed upon the jury that they should disregard any opinion that might have been expressed by the court, and make up their own opinion of the testimony in the case, and the disavowal of any intention to express any personal opinion upon any facts involved in the case, the rights of the defendant were fully protected, and there was no error.

The judgment of the District Court is affirmed.

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(259 Fed. 783)

WATCHMAKER v. BARNES. LEVI v. SAME. RUDNICK v. SAME (two cases). MELTZER v. SAME.

(Circuit Court of Appeals, First Circuit. June 18, 1919.)

Nos. 1391, 1393–1396.

1. APPEAL AND ERROR ⚷1008(2)—REVIEW—TRIAL TO COURT WITHOUT JURY.
Where actions at law were tried to the court, jury being waived, findings of the court cannot be reversed on error, unless they are clearly wrong, because not sustained by any view of the evidence, or were induced by mistaken view of the law.

2. BANKRUPTCY ⚷166(4)—PREFERENCE—NOTICE.
Knowledge that a bankrupt who makes a payment to or on behalf of a creditor has committed forgery is notice of a fact which would incite a person of reasonable prudence to inquiry, and must be deemed notice of all facts which a reasonably diligent inquiry would disclose for the purpose of determining whether the payment was preferential within Bankruptcy Act July 1, 1898, § 60 (Comp. St. § 9644).

3. BANKRUPTCY ⚷164—PREFERENCE—RECOVERY.
Where indorsers of notes who had rediscounted them induced the bankrupt to pay the same, the trustee in bankruptcy may recover such payments from the indorsers as preferences within Bankruptcy Act July 1, 1898, § 60 (Comp. St. § 9644), provided the indorsers had reasonable cause to believe, when payments were made, that the bankrupt was insolvent, etc.

4. BANKRUPTCY ⚷303(3)—PAYMENTS—PREFERENCE.
In a suit by trustee in bankruptcy against one who discounted for the bankrupt notes bearing forged indorsements, evidence *held* to show that the payments were preferential within Bankruptcy Act July 1, 1898, § 60 (Comp. St. § 9644); the defendant knowing before payment of the forged indorsements.

5. BANKRUPTCY ⚷159—OBTAINING PROPERTY BY FRAUD—GENERAL CREDITOR.
Though bankrupt obtained defendant's money by fraud, yet defendant had a claim against him provable in bankruptcy proceedings, and was a creditor.

6. BANKRUPTCY ⚷164—"PREFERENCE"—WHAT CONSTITUTES.
Where defendant, who discounted a note for the bankrupt, discovered on the following day that an indorsement was forged, and called on the bankrupt to return the money, *held* that where the bankrupt was unable to do this, and defendant accepted a postdated check, which was shortly paid, the transaction was preferential, within Bankruptcy Act July 1, 1898, § 60 (Comp. St. § 9644), and cannot be upheld on the theory that defendant was merely procuring a return of his money, for by accepting a postdated check, which was paid from the bankrupt's general funds, defendant became a general creditor.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Preference.]

7. BANKRUPTCY ⚷164—TRANSFERS—WHEN CONSUMMATED.
Where a creditor of a bankrupt accepted a postdated check, the transfer of the bankrupt's property occurred, not on delivery of the check, but on payment of the same.

8. BANKRUPTCY ⚷166(4)—PREFERENCE—WHAT CONSTITUTES.
Under Bankruptcy Act July 1, 1898, § 60, as amended by Act June 25, 1910 (Comp. St. § 9644), it is not a necessary element of a preference that the party receiving a payment from the bankrupt or benefiting thereby should have reasonable cause to believe that a preference was intended.

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9. BANKRUPTCY ⟹467—REVIEW—AGREED STATEMENT OF FACTS.
In a suit by the trustee in bankruptcy to recover an alleged preferential payment, where the circumstances under which the payment was made were set out in the agreed statement of facts, and the parties proceeded in the submission of the facts upon the idea that the court should draw such inferences as were warranted and necessary, the Court of Appeals may dispose of the case by drawing such inferences as are necessary.

10. BANKRUPTCY ⟹303(3)—PREFERENCE—ACTION.
In action by the trustee in bankruptcy to recover alleged preferential payments, the finding of the trial court that the payments were preferential and were induced by threats on the part of the creditor, after discovery that indorsements on the notes discounted were forgeries, *held* warranted.

11. BANKRUPTCY ⟹303(3)—PREFERENCE—PAYMENT.
In a suit to recover payments made on notes which defendant had rediscounted, evidence *held* sufficient to show that one of the defendants knew of the fact that indorsements on the notes had been forged, and communicated such fact to his codefendant, and that payments which the bankrupt was induced to make by promise of further credit were preferential.

In Error to the District Court of the United States for the District of Massachusetts; James M. Morton, Jr., Judge.

Actions by Clarence A. Barnes, trustee in bankruptcy, against Isaac Watchmaker, against Louis S. Levi, against Abraham G. Rudnick, against Benjamin Rudnick, and against Michael I. Meltzer. There were judgments in each case for the trustee, and each defendant brings error. Judgment affirmed in each case.

Abraham K. Cohen, of Boston, Mass. (David M. Watchmaker, of Boston, Mass., on the brief), for plaintiff in error Watchmaker.

Charles H. Dow, of Boston, Mass. (Samuel Sigilman, of Boston, Mass., on the brief), for plaintiff in error Levi.

David Stoneman, of Boston, Mass. (C. S. Hill, of Boston, Mass., Elijah Adlow, of Roxbury, Mass., and Stoneman, Gould & Stoneman, of Boston, Mass., on the brief), for plaintiffs in error Rudnick and Meltzer.

Clarence A. Barnes, of Boston, Mass. (White & Barnes, of Boston, Mass., on the brief), for defendants in error.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

JOHNSON, Circuit Judge. In each of the above actions, the plaintiff, the defendant below, and hereinafter called the defendant, seeks a review of a judgment recovered in action at law by the trustee in bankruptcy of David M. Rubin, under the provisions of section 60b of Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 562, as amended by Act June 25, 1910, c. 412, § 11, 36 Stat. 842 [Comp. St. § 9644]), which, so far as it relates to the matters in issue, is as follows:

"If a bankrupt shall * * * have made a transfer of any of his property, and if, at the time of transfer, * * * and being within four months before filing of the petition in bankruptcy, * * * the bankrupt be insolvent and the * * * transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall

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then have reasonable cause to believe that * * * such * * * transfer would effect a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

Under section 60a of the same act, as amended by Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 (Comp. St. § 9644), a preference is defined as follows:

"A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, * * * made a transfer of any of his property, and the effect of the enforcement of such * * * transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

[1] A jury trial was waived in each case, and in each the learned judge of the District Court found that all the essentials to a recovery by the plaintiff were either admitted or proved by uncontradicted evidence, except whether, at the time when the payments were made, the several defendants knew that Rubin had committed forgery; and if they did know, whether this knowledge in connection with all facts shown to have been known to them, or which it could reasonably be inferred were known to them, furnished reasonable cause to believe him to be insolvent, and that the payments made by him would effect a preference. Upon these questions he found for the plaintiff. His findings cannot be reversed unless they are clearly wrong, because not sustained by any view of the evidence or inferences which might reasonably be drawn therefrom or induced by a mistaken view of the law.

It appeared at the trial that Rubin had been engaged in the wholesale coal business in Chelsea, Mass., for several years under the name of the Chelsea Iron & Coal Company; that he owed large sums of money to various banks, private money lenders, and other people; that he had borrowed large sums of money from time to time on promissory notes, to which he either forged the signatures or indorsements of some one of several relatives who were known to Rubin's creditors as responsible financially. Rubin testified that he was insolvent in 1914; that his condition grew worse, until in 1915 and 1916 it had become very desperate; that his assets were merely nominal, and he owed over $120,000 at the time of bankruptcy; that for over a year prior to his bankruptcy he had been forging extensively the names of various friends and relatives, and on the strength of said forgeries had obtained many thousands of dollars from about 40 different firms and individuals in Boston; that he had exhausted his credit at the banks in the spring of 1916 and was obliged to deal with various private money lenders, paying interest at the rate of from 1 to 3 per cent. a month, and in some cases bonuses in addition. A petition in bankruptcy was filed by his creditors on December 15, 1916, and he was duly adjudicated a bankrupt on January 9, 1917.

[2] Whether knowledge that Rubin had committed forgery, taken with all other testimony in each case, constituted reasonable cause to believe that he was insolvent when the payments were made by him of notes which had been discounted for him by the several defendants and upon which they were indorsers, and that these payments would

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effect a preference, was the principal question in all the cases, and its discussion and our conclusion will apply to all. That a debtor would commit the crime of forgery which, if detected, might subject him to severe punishment, would indicate to the ordinarily intelligent mind that his financial condition must be desperate, and leads us to the same conclusion as that reached by the learned district judge, that information that forgery had been committed by Rubin would incite in the mind of a reasonably intelligent man more than suspicion and furnish reasonable cause for belief that he was insolvent, as defined in the Bankruptcy Act, and that the payments made by him would effect a preference. What will constitute reasonable cause for belief under the Bankruptcy Act has been considered many times in both federal and state courts, but it is evident that no general rule could be laid down which would apply to every case, but that each must be decided upon its own facts and the circumstances surrounding them.

In Connors v. Bucksport National Bank, 214 Fed. 847, decided in the District Court of Maine, it was held that knowledge on the part of the bank that forgery had been committed by the bankrupt, taken in connection with all the other testimony, constituted reasonable cause to believe that the bankrupt was insolvent when he executed certain mortgages to the bank, and this finding was affirmed by this court 216 Fed. 990, 132 C. C. A. 90. In Putnam v. United States Trust Co., 223 Mass. 199, 204, 111 N. E. 969, the court held that knowledge that the bankrupt had committed forgery, taken in connection with other testimony in the case, furnished reasonable cause for belief that payments received by the bank would effect a preference. We think that knowledge that the bankrupt has committed forgery is notice of a fact which would incite a person of reasonable prudence to an inquiry under similar circumstances, and is notice of all the facts which a reasonably diligent inquiry would disclose. Farmers' State Bank v. Freeman, 249 Fed. 579, 161 C. C. A. 505; Coder v. McPherson, 152 Fed. 951, 82 C. C. A. 99; Huttig Manufacturing Co. v. Edwards, 160 Fed. 619, 87 C. C. A. 521; Peters v. Bain, 133 U. S. 670. 693, 10 Sup. Ct. 354, 33 L. Ed. 696; National City Bank v. Hotchkiss, 231 U. S. 50, 57, 34 Sup. Ct. 20, 58 L. Ed. 115.

[3] All the payments which the trustee seeks to recover in these actions, with but one or two exceptions, were made to banks in which the defendants had rediscounted the notes which they had discounted for Rubin. As indorsers upon the notes so paid they were benefited by these payments, and the trustee may recover such payments from them, provided they had reasonable cause to believe, when they were made, that Rubin was insolvent; that their payment would effect a preference; and that as found by the learned district judge in each case, which we think is sustained by the evidence, they had procured Rubin to make them. Swarts v. Fourth National Bank, 117 Fed. 1, 54 C. C. A. 387; Cohen v. Goldman, 250 Fed. 599, 162 C. C. A. 615; Kobusch v. Hand, 156 Fed. 660, 84 C. C. A. 372, 18 L. R. A. (N. S.) 660; Stern v. Paper (D. C.) 183 Fed. 228; In re Silvernail Co. (D. C.) 218 Fed. 979; Lazarus v. Eagen (D. C.) 206 Fed. 518; Paper v. Stern, 198 Fed. 642, 117 C. C. A. 346; National Bank of Newport v. Herkimer Bank,

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225 U. S. 178, 32 Sup. Ct. 633, 56 L. Ed. 1042; Bartholow v. Bean, 18 Wall. 635, 2 L. Ed. 866; Landry v. Andrews, 22 R. I. 597, 48 Atl. 1036; Brown v. Streicher (D. C.) 177 Fed. 473.

The learned judge of the District Court has found that all the payments made by Rubin which the trustee seeks to recover in these actions were made from Rubin's general funds, which "were largely the proceeds of other forged notes which Rubin put out from time to time to meet notes coming due. In no case was the sum received on a note held separate and used to pay the note by which it had been obtained." The evidence upon which this finding was made has not been reported, but as it has not been questioned by counsel we accept it as fully sustained by the evidence.

The Case Against Meltzer.

[4] The defendant Meltzer was engaged in the metal business in Chelsea for a number of years, and knew Rubin slightly, and the persons whose names appeared as indorsers upon his notes intimately. On July 24, 1916, he loaned Rubin $2,450 upon several promissory notes, signed or indorsed by Rubin and purporting to be signed or indorsed by several persons and firms known to the defendant to be men of financial responsibility. On November 1, 1916, two of these notes, one for $500 and the other for $250, became due. Rubin telephoned to the defendant that he would be unable to pay these notes, and asked for an extension, which was refused. He thereupon paid the $250 note, and the $500 note was protested. That night Rubin testified that he went to Meltzer's home, and asked him to renew the note for $500, and Meltzer said he did not want any further business with him and said:

> "Pay that note and that other one that is coming due within a few days or else you will be in the hands of the police. I have already been over there with the note and also had one of the witnesses there and had the police over to one of the indorsers to verify it, and have got everything all in good shape. Now it is up to you and I have got nothing further to say."

A police inspector testified that on November 13, 1916, Meltzer made a complaint to police headquarters, that Meltzer went with him to the office of Frank Hershmann, one of the indorsers, and the alleged signature of Hershmann upon the note held by Meltzer was compared with genuine signatures of Hershmann and discovered to be a forgery. Between November 1 and November 14, 1916, Rubin paid $1,359 to take up certain notes which had been discounted for him by Meltzer, including the note for $500 which fell due November 1st, and the judgment which was rendered against Meltzer we think was fully sustained by the evidence.

The Case Against Watchmaker.

[5, 6] It is admitted that Watchmaker discovered on the day after he had discounted a note of $500 for Rubin that the indorsement of one Frank Hershmann upon it was forged, and that he then called upon Rubin to return his money. This Rubin was unable to do, having deposited the money in his general account and used it to pay his bills.

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He gave Watchmaker a check which was dated ahead three or four days and Watchmaker held the note. The check was paid upon its date, and the note was then surrendered.

It is claimed that such payment did not constitute a preference, but was simply a restitution of money which Rubin had fraudulently obtained from the defendant by forgery; that, under section 60a of the Bankruptcy Act, it is only a transfer which will "enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class" which will constitute a voidable preference, and that Watchmaker was not a creditor. Even though Rubin had obtained the defendant's money by fraud, yet he was under an obligation to restore it, and the defendant had a claim against him which was provable in bankruptcy and was a creditor. Clark v. Rogers, 228 U. S. 534, 33 Sup. Ct. 587, 57 L. Ed. 953; Richardson v. Shaw, 209 U. S. 365, 28 Sup. Ct. 512, 52 L. Ed. 835, 14 Ann. Cas. 981; Tindle v. Birkett, 205 U. S. 183, 27 Sup. Ct. 493, 51 L. Ed. 762; Crawford v. Burke, 195 U. S. 176, 193, 25 Sup. Ct. 9, 49 L. Ed. 147; Bush et al. v. Moore et al., 133 Mass. 198. By accepting a postdated check he had waived the tort, and relied upon the promise of Rubin to pay the check upon its date. The language of Justice Holmes in National Bank v. Hotchkiss, supra, is particularly in point:

> "The consent to become a general creditor for an hour, that was imported, even if not intended to have that effect, by the liberty allowed to the firm, broke the continuity and established the loan as part of the assets. No doubt many general creditors have increased a bankrupt's estate by their advances, but they have lost the right to take them back."

If the money received by Rubin from Watchmaker had been upon deposit, even with the funds of Rubin, at the time when the forgery was discovered by Watchmaker and he called upon Rubin to return his money, it might be held, under the authority of Bank v. Insurance Co., 104 U. S. 54, 26 L. Ed. 693, Gorman v. Littlefield, 229 U. S. 19, 33 Sup. Ct. 690, 57 L. Ed. 1047, Richardson v. Shaw, 209 U. S. 365, 28 Sup. Ct. 512, 52 L. Ed. 835, 14 Ann. Cas. 981, and Hewitt v. Hayes, 205 Mass. 356, 91 N. E. 332, 137 Am. St. Rep. 448, that this deposit was impressed with a trust in favor of Watchmaker; but from the agreed statement of facts it appears that Rubin did not have $500 upon deposit at the time when Watchmaker called for a return of his money, and was forced to give the latter a postdated check, which was paid from his general funds in which Watchmaker had no greater interest than any other creditor. In re Mulligan (D. C.) 116 Fed. 715; Frelinghuysen v. Nugent (C. C.) 36 Fed. 229; Board of Com'rs v. Strawn, 157 Fed. 49, 51, 84 C. C. A. 553, 15 L. R. A. (N. S.) 1100.

[7] The transfer of the debtor's property took place, not at the delivery of the postdated check, but at the payment of the same. In re Lyon, 121 Fed. 723, 58 C. C. A. 143.

[8] On December 1, 1916, another note in the sum of $500, which had been discounted by Watchmaker for the bankrupt on August 1, 1916, matured, but Rubin was unable to pay the note, and called at the place of business of the defendant, and paid him the sum of $140 on account of the same, and later sent his check for $360, which has never

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been paid. Counsel contends in argument that the agreed facts contain no statement that Watchmaker, when the payment of $140 was made, had reasonable cause to believe that a preference was intended or that he was by such payment to receive from Rubin any more than any other creditors of the same class, and that this court and the court below are not authorized to infer this fact from the agreed facts; but since the amendment of June 25, 1910, c. 412, § 11, 36 Stat. 842 (Comp. St. 1916, § 9644), it is not a necessary element of a preference that the party receiving a payment from a bankrupt, or benefited thereby, should have had reasonable cause to believe that a preference was intended.

[9] Whether by such payment Watchmaker had reasonable cause to believe that he would receive from Rubin any more than any other creditors of the same class was a fact which could be inferred by the court from the agreed facts. The circumstances under which the payment was made were set out in the agreed statement of facts, and we think that the record shows that the parties proceeded in the submission of the facts upon the idea that the court should draw such inferences from them as were warranted and necessary to a proper disposition of the case, and such is the practice in this circuit. Flanders Motor Co. v. Reed, 220 Fed. 642, 136 C. C. A. 250; compare Public Acts Mass. 1913, c. 716, § 5.

The Case Against Levi.

[10] The evidence in the case against Levi showed that he was engaged in the real estate and money lending business, and that he had no acquaintance or business dealings with Rubin until on or about August 16, 1916, when, at Rubin's request, at his office in Boston, he discounted for him two notes of $500 each, in which Rubin, under the name of the Chelsea Iron & Coal Company, was payee, and on which there were several indorsers, including one Hershmann; that the dates of maturity of these notes were November 14 and December 14, 1916, respectively; that he never discounted any other notes for Rubin, and never met him again until November 14, 1916, when one of the notes fell due. The maker of this note was the Star Waist Company, of which Philip Bromfield, a brother-in-law of Rubin, and also a brother-in-law of Frank Hershmann, one of the indorsers of the note, was the treasurer. Rubin testified that on the date of the maturity of that note he went to Levi's office at about 3 o'clock in the afternoon, and told him he had been trying very hard to get money to pay the note, and asked him for a renewal or an extension of time of payment for a week or ten days, which the defendant refused, saying that he had telephoned to the Star Waist people and found their telephone disconnected, and "it is a funny kind of a deal anyway"; that while he was in the defendant's private office Frank Hershmann, whose name appeared as an indorser on the notes, came in. Levi showed him the note then due, and Hershmann denied his signature. After Hershmann left, Levi insisted that Rubin had better make arrangements to pay the note, and that when Rubin called his attention to the fact that the time was after banking hours, Levi said:

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"I will telephone up to the bank and arrange with them to hold that note over for you all the afternoon, for that matter, and you had better get busy."

He testified that he pleaded with Levi for a renewal or extension, and he said:

"I don't want to listen to that kind of stuff; I insist on getting my money. It is a funny thing; if you don't pay these notes I am going to place it in the hands of the police. I will telephone up to the bank that they will receive your money any time this afternoon up to 5 o'clock."

Rubin testified that he managed to get the money and paid the note at the bank that afternoon.

Levi testified that upon November 14th he was informed by the bank in which the note had been deposited that it had not been paid; that he then told his bookkeeper, a young woman, to telephone the maker of the note; and, being informed that the telephone was disconnected, he told her to telephone Rubin, and, being unable to get Rubin, she called Hershmann, by Levi's direction, and he talked with Hershmann on the telephone, telling him that a note made by the Star Waist Company, and bearing Hershmann's indorsement, was due that day and unpaid, and asking Hershmann what he wanted to do about it, saying he must notify the bank within a few minutes whether the note should be protested. Hershmann said he was busy then. and Levi told him that if he wished he would come down to Hershmann's office, but Hershmann said, "No; I will come right up to your office; I will be there in about 10 or 15 minutes;" that before Hershmann arrived at Levi's office Rubin arrived and paid the note. Levi further testified that when Hershmann came to his office he said to him, "The note that you came up to see, that you indorsed on, is paid." He denied that Rubin, when he called upon him, made any plea for an extension of time on account of financial embarrassment, or that he told him that he knew there was anything wrong with the indorsement on the notes, and that Rubin paid the note at his office a little after 3 o'clock.

There was conflicting evidence as to what occurred at Levi's office after Hershmann came there on the afternoon of November 14th, and also in regard to the talk over the telephone between Levi and Hershmann before the latter went to Levi's office. Hershmann testified that he told Levi that his indorsement upon the note was a forgery. This was denied by Levi, who said that Hershmann only told him that he would come right up to the office, and that when he did come up the only thing he said was, "It is all right," or words to that effect, and that Hershmann left without any further talk.

The learned district judge saw the witnesses and could judge of their credibility. He has found that the testimony of Hershmann as to the conversation over the telephone and what occurred at Rubin's office was true, and we feel this finding is fully sustained by the evidence, and that he was justified in finding that Levi had knowledge of this forgery before this note was paid, and, having this knowledge, he procured by threats the payment of both of the notes discounted by him.

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The Cases Against the Rudnicks.

[11] Abraham G. Rudnick is the father of Benjamin Rudnick. Rubin testified he began doing business with the elder Rudnick in the early part of the summer of 1916; that he had paid this defendant interest a little in excess of 1 per cent. per month; that some time in the summer of 1916 Abraham G. Rudnick discounted two notes for him for $500 each, which matured, one on the 20th and the other on the 25th day of November, 1916; and that the names of all the indorsers on these notes were forged. Some time in July, 1916, the son, Benjamin Rudnick, discounted two notes for Rubin, one for $400, maturing November 20, 1916, and the other for $500, maturing at a later date; and Rubin testified that all the signatures and indorsements upon these notes were forgeries.

On November 20, 1916, when one of the notes for $500, discounted by the father, and the note of $400, discounted by Benjamin, fell due, they were both protested for nonpayment; and on the evening of that day Benjamin Rudnick made an appointment with Rubin over the telephone to meet him the next day. When they met Rubin told Benjamin that he was in no position to take up these notes; that he was pressed for money and could not get it. Benjamin told him that he knew he was in bad shape, but that the notes must be paid, and promised that his father would make him a further loan of at least $1,000 if he would pay these notes, and said to him:

> "You can take me at my word. All you have got to do is simply to go out and see if you can get this money, and when these notes are paid there is no question but that father will give you that $1,000."

There was evidence that he also stated that all notes that were discounted by his father were approved by him. After this conference Rubin paid to Benjamin $500, to be paid to his father, and $175 upon the note for $400, discounted by Benjamin; and on November 25th, when the other note of $500, which had been discounted by Abraham, matured it was paid by Rubin at the bank where it had been rediscounted by Abraham; and the note of $500 was paid at maturity at the bank where it had been rediscounted by Benjamin; so that both the notes of $500 each, which had been discounted by Abraham, were paid, and also the note of $500, which had been discounted by Benjamin, and the latter also received $175 on account of the $400 note which he had discounted.

There was evidence that one A. K. Mann, who was one of the indorsers upon these notes, met Benjamin Rudnick between the 1st and 5th of November, and told him that if he had any notes bearing his indorsement that such indorsement was a forgery. Benjamin Rudnick did not deny that he had such a conversation with Mann, but claimed that it was in the latter part of November, and not in the early part of November.

Rubin testified that when he took up with Abraham Rudnick the proposition of the loan of $1,000 in the way of renewal, the latter said that his son had advised him not to renew, and he refused to do so; that he then saw the son Benjamin, who had assured him that his fa-

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ther would make this loan if he would pay the notes which matured upon November 20th, and Benjamin said:

"You ought to consider yourself fortunate that you are able to pay these; otherwise you would have been in a very, very bad fix. I don't care a rap about any of the indorsements upon these notes; the indorsements are questionable."

This statement furnishes strong evidence of his knowledge of Rubin's forgeries, as it was made after Meltzer had laid the matter of Rubin's forgeries before the police department, and Levi had learned from Hershmann on November 14th that his indorsement had been forged, and after Mann testified he had told him that his indorsement had been forged.

We think there was sufficient evidence to warrant the learned district judge in finding that Benjamin Rudnick knew, on November 20, 1916, that Rubin had been forging. We also think there was sufficient evidence to support the finding that Benjamin Rudnick was acting as the agent of his father in the receipt of the payment of $500 from Rubin, and that, in view of the relationship that existed and the testimony of Rubin that Benjamin said that he approved notes discounted by his father, and that the father, when applied to for a further loan of $1,000 in the way of renewal, said that he would have to consult with his son, the inference could be fairly drawn by the court below that the information which Benjamin had in regard to Rubin's forgeries was communicated to the father. This statement in the opinion of the learned district judge we think was warranted by the evidence:

"All the payments in this case were made three weeks or more after the forged Meltzer note had gone to protest, and a week after Meltzer had been to the police about it, at a time when a number of persons with whom Rudnick would be likely to come into contact knew Rubin had been forging. Such knowledge spreads fast. There is no denial of Mann's evidence that he inquired at the Tremont Trust Company about notes bearing his name, as he says he did; such an inquiry would more naturally be made before protest notices were received than afterwards. Rudnick displayed an anxiety about the notes easily explainable if he thought they were forgeries, and not easily otherwise.

"While the case is not free from doubt, in my opinion Benjamin Rudnick, on November 20th, believed that Rubin had been forging, and that the notes held by himself and his father were probably forgeries; and I so find. Instead of endeavoring to collect by threats or force, he adopted the policy of doing so by holding out to Rubin illusive assurances of further loans if those then due were promptly paid. In this way he obtained for himself and his father (or to the banks for their benefit) the payment here in question. I do not for a moment believe that the son's knowledge and suspicions on this matter, and what he was doing with reference thereto, were not communicated to his father. I accordingly find that the defendants, A. G. Rudnick and Benjamin Rudnick, at the time when each of the payments above referred to was made, had reasonable cause to believe that Rubin was then insolvent, and that the sums in question must be returned to the trustee."

We think there was evidence to warrant a finding that Benjamin Rudnick, acting for himself and as agent for his father, procured Rubin to make the payments of the notes which both he and his father had discounted and upon which their names appeared as indorsers. As they were creditors and were benefited by these payments, judgment was properly rendered against each of them for the amount of the

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payments made by Rubin on account of the notes which each had discounted.

The judgment of the District Court is affirmed in each case, with costs in this court to the defendant in error.

(259 Fed. 793)

STANDARD FASHION CO. v. MAGRANE HOUSTON CO.*

(Circuit Court of Appeals, First Circuit. June 28, 1919.)

No. 1343.

1. SALES ⟹84—CONSTRUCTION OF CONTRACT—DURATION.
Where a sales contract ran for a term of two years, and from term to term thereafter, until terminated by three months' notice in writing given within 30 days after expiration of any contract period, the duration of the contract is automatically extended for another two-year term upon failure to give the required notice.

2. SALES ⟹58—CONSTRUCTION OF CONTRACT—NEGATIVE COVENANT.
Where a sales contract ran for a two-year term, and from term to term thereafter, until terminated by three months' notice in writing given 30 days after expiration of any contract period, etc., a negative covenant not to sell certain goods during the term of the contract applies to the entire life of the contract, and not merely to the first two-year term.

3. SALES ⟹7—CONTRACT—DISTINGUISHED FROM AGENCY.
A contract by which title to patterns passed to defendant, *held* a sales, and not an agency, contract.

4. APPEAL AND ERROR ⟹843(1)—JURISDICTION—INJUNCTION.
That plaintiff's right to an injunction expired pendente lite does not relieve court from duty of determining substantial issues existing when case is argued upon appeal.

5. STATUTES ⟹225—CONSTRUCTION—CLAYTON ACT.
The fact that the Clayton Act Oct. 15, 1914, was enacted after similar restrictions had been held not obnoxious at common law or under federal and state anti-trust laws, creates an inference that Congress intended to change the law.

6. MONOPOLIES ⟹17(2)—CLAYTON ACT—RESALE CONTRACT.
A buyer's covenant not to sell patterns except those of seller, during term of a sales contract *held* to violate the Clayton Act Oct. 15, 1914, § 3 (Comp. St. § 8835c).

Appeal from the District Court of the United States for the District of Massachusetts; Chas. F. Johnson, Judge.

On rehearing. Rehearing granted, and judgment of trial court affirmed.

For former opinion, see 251 Fed. 559, 163 C. C. A. 553.

Robert G. Dodge, of Boston, Mass. (Herbert Noble and James B. Sheehan, both of New York, on the brief), for appellant.

James W. Sullivan, of Lynn, Mass., for appellee.

Before BINGHAM and ANDERSON, Circuit Judges, and BROWN, District Judge.

ANDERSON, Circuit Judge. After the per curiam opinion of June 28, 1918, the plaintiff petitioned for a rehearing. The petition

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⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Certiorari granted 250 U. S. 658, 40 Sup. Ct. 54, 64 L. Ed. —.

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was granted. The plaintiff has orally and on brief elaborately reargued the case. On careful reconsideration we are constrained to adopt the construction of the contract urged by the plaintiff and made by the court below.

Construing the contract as a whole, we do not think it can fairly be held so ambiguous as, if valid in all its provisions, to warrant the court in refusing the injunction prayed for.

The contract runs for a term of two years from date, and "from term to term thereafter, until this agreement is terminated as hereinafter provided." The provision for termination is:

> "Either party desirous of terminating this agreement must give the other party three months' notice in writing within thirty days after the expiration of any contract period as above specified, the agency to continue regularly during such three months."

The contract is dated November 25, 1914. Its first two-year term ran to November 25, 1916; failing the three months' notice within thirty days thereafter, the contract then ran until November 25, 1918. Then for 30 days there was another opportunity to give the three months' written notice of termination. And so on from term to term.

[1, 2] We think the negative covenant (assuming for the moment it and the rest of the contract to be valid) is applicable to the entire life of the contract construed as to duration as we have indicated; that the contract shows a clear intention of the defendant to be bound for successive terms of two years, and for three months after notice of termination. We adopt, therefore, the construction put upon the contract by the court below.

[3] We also agree with the District Court that the contract does not establish an agency "properly so termed," but that it is a contract for sale. The case is easily distinguishable in this regard from Willcox & Gibbs Co. v. Ewing, 141 U. S. 627, 12 Sup. Ct. 94, 35 L. Ed. 882. Full title passed from the plaintiff to the defendant. The defendant was selling its own goods to its own customers; it was not, under delegated authority, selling plaintiff's goods to the plaintiff's customers.

See the cases collected and to some degree discussed in Ford Motor Company v. Union Motor Sales Co., 244 Fed. 156, 156 C. C. A. 584; and Ford Motor Company v. Benjamin E. Boone, Inc., 244 Fed. 335, 156 C. C. A. 621; cf. Mechem on Agency, §§ 44–48, and cases cited; Mechem on Sales, § 41 et seq.; 2 Corpus Juris, pp. 422, 423; John H. Pray & Sons Co. v. Appledore L. & Bldg. Co., 76 N. H. 167, 80 Atl. 337; Bendix v. Staveo Carridge Co., 174 Ill. App. 589, 595.

An agency is not created simply by calling a contract for sales an agency contract.

We may test the question whether the defendant was the plaintiff's agent engaged in selling the plaintiff's goods, or a vendee selling its own goods, by querying whether the plaintiff could be held liable in tort for the defendant's material and false misrepresentations made to a customer—such misrepresentations, for instance, as that patterns sold embodied the latest Paris fashion when in fact they were obsolete. Obviously, if the defendant was the plaintiff's agent, its misrepresenta-

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tions, made in the course of the business of the agency, would bind the plaintiff. We think the plaintiff would be surprised to find this or any other court holding it responsible for such tortious conduct of the defendant with relation to the sale of these patterns.

The plaintiff admits that the notice of termination given by the defendant on April 7, 1917, followed by this suit brought on July 25, 1917, must be deemed applicable to the term of the contract expiring on November 25, 1918, as though given within 30 days after November 25, 1918. The plaintiff consequently admits that its right to an injunction expired on February 25, 1919.

[4] But the plaintiff insists that the fact that relief by injunction has now become inappropriate by reason of lapse of time does not warrant the court in refusing to retain jurisdiction in equity for the purpose of granting any appropriate relief, though it be only for the assessment of damages. Clark v. Wooster, 119 U. S. 322, 7 Sup. Ct. 217, 30 L. Ed. 392; Busch v. Jones, 184 U. S. 598, 22 Sup. Ct. 511, 46 L. Ed. 707; Cartwright v. So. Pacific (D. C.) 206 Fed. 234; Beedle v. Bennett, 122 U. S. 71, 7 Sup. Ct. 1090, 30 L. Ed. 1074; County of Mobile v. Kimball, 102 U. S. 691, 26 L. Ed. 238.

Assuming for the moment that the contract and all the stipulations thereof are valid, the great weight of authority is in favor of the plaintiff's proposition that it was entitled to an injunction against a breach of the negative covenant. Butterick Publishing Co. v. Fisher, 203 Mass. 122, 89 N. E. 189, 133 Am. St. Rep. 283; Standard Fashion Co. v. Siegel-Cooper Co., 30 App. Div. 564, 52 N. Y. Supp. 433; Id., 157 N. Y. 60, 51 N. E. 408, 43 L. R. A. 854, 68 Am. St. Rep. 749; Butterick Publishing Co. v. Chabot, N. Y. Law Journal, July 21, 1908, affirmed 128 App. Div. 900, 112 N. Y. Supp. 1123; Butterick Publishing Co. v. Rose, 141 Wis. 533, 124 N. W. 647; Peerless Pattern Co. v. Gauntlett Dry Goods Co., 171 Mich. 158, 136 N. W. 1113, 42 L. R. A. (N. S.) 843.

We think, therefore, that the plaintiff's contention that it is now entitled to a decision from this court either affirming or reversing the decision of the District Court must prevail. The plaintiff insists, and rightly, that the gist of the case is whether the Clayton Act Oct. 15, 1914, c. 323, 38 Stat. 730, invalidates its contract, in whole or any part, and that the fact that its right to an injunction has expired pendente lite does not relieve the court from the duty of determining the issues admittedly alive and involving substantial rights at the time of the argument of the appeal in this court.

[5, 6] Does section 3 of the Clayton Act (Comp. St. § 8835c) invalidate the negative covenant in this contract? We think it does, and that the decision of the District Court in that regard must be affirmed.

The mere fact that Congress enacted the Clayton Act after numerous courts had held similar or analogous restrictions not obnoxious to the Sherman Act July 2, 1890, c. 647, 26 Stat. 209 (Comp. St. §§ 8820–8823, 8827–8830), or invalid at common law, or under state anti-trust statutes, grounds an inference that the Legislature intended in the light of actual experience, to change the law. Butterick Pub. Co. v. Fisher, 203 Mass. 122, 89 N. E. 189, 133 Am. St. Rep. 283; Brown

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v. Rounsavell, 78 Ill. 589; Southern Fire Brick & Clay Co. v. Garden City Sand Co., 223 Ill. 616, 79 N. E. 313, 7 Ann. Cas. 50; Heimbuecher v. Goff, Horner & Co., 119 Ill. App. 373; Ferris v. American Brewing Co., 155 Ind. 539, 58 N. E. 701, 52 L. R. A. 305; J. W. Ripy & Son v. Art Wall Paper Mills, 41 Okl. 20, 136 Pac. 1080, 51 L. R. A. (N. S.) 33; In re Greene (C. C.) 52 Fed. 104; Mogul Steamship Co. v. McGregor, 1892 A. C. 25; Whitwell v. Continental Tobacco Co., 125 Fed. 454, 60 C. C. A. 290, 64 L. R. A. 689; Peerless Pattern Co. v. Gauntlett Dry Goods Co., 171 Mich. 158, 136 N. W. 1113, 42 L. R. A. (N. S.) 843; Sullivan v. Rime, 35 S. D. 75, 150 N. W. 556; Standard Fashion Co. v. Siegel-Cooper Co., 30 App. Div. 564, 52 N. Y. Supp. 433; Id., 157 N. Y. 60, 51 N. E. 408, 43 L. R. A. 854, 68 Am. St. Rep. 749; Butterick Publishing Co. v. Chabot, N. Y. Law Journal, July 21, 1908, affirmed 128 App. Div. 900, 112 N. Y. Supp. 1123; Butterick Publishing Co. v. Rose, 141 Wis. 533, 124 N. W. 647.

There is no answer to the suggestion of Judge Trieber in U. S. v. United Shoe Machinery Co. (D. C.) 234 Fed. 127, 150, that the "presumption is, not that Congress intended that the construction of the Sherman Act should control, but, on the contrary, that it should not control." And again quoting from Judge Trieber: "Evidently Congress was not satisfied to only prohibit actual lessening of competition, or monopolizing, but to make it unlawful for any person to do these acts, which may put it in his power to do so."

The very title of this act is significant—"An act to *supplement* existing laws against unlawful restraints and monopolies, and for other purposes."

In the report of the Senate Committee on Judiciary upon this bill is the following statement of the legislative purpose:

"Broadly stated, the bill, in its treatment of unlawful restraints and monopolies, seeks to prohibit and make unlawful certain trade practices which, as a rule, singly and in themselves, are not covered by the act of July 2, 1890, or other existing anti-trust acts, and thus, by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation. Among other of these trade practices which are denounced and made unlawful may be mentioned discrimination in prices for the purpose of wrongfully injuring or destroying the business of competitors; exclusive and tying contracts; holding companies; and interlocking directorates."

In the report of the House Committee there is also instructive language concerning section 3:

"Let us therefore consider what this section really accomplishes. It prohibits the exclusive or 'tying' contract made between the manufacturer and the dealer by purchase or lease, whereby the latter agrees, as a condition of his contract, not to use or deal in the commodities of the competitor or rival of the seller or lessor. It is designed merely to prevent this unfair trade practice now so common throughout the country, and which is generally regarded by every one who has given the subject any serious consideration as unjust to the local dealer and to the community and as monopolistic in its effects."

"What is the motive and purpose of the manufacturer in making or entering into such exclusive contract? It is undoubtedly his purpose to drive out competition and to establish a monopoly in the sale of his commodities in that particular community or locality. His contract by its express terms completely shuts out competition in the business of the local dealer with whom he makes it. The dealer bound by this exclusive contract not to handle the

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goods, wares, and merchandise of another becomes the ally of the manufacturer in his effort and purpose to drive out competition in the locality or community in which such commodities are sold. This is done by means of extensive advertising, and let it be borne in mind also that this advertising is added in the price of the commodities and paid for by the consumer. If by the combined efforts of the manufacturer and the local dealer and the glowing and overdrawn and oftentimes false advertisements competitors are compelled to retire from the field, a monopoly in the particular community or locality is the invariable result. In this connection it is important to state that to-day in every village and locality where there is only a single store, and this exclusive or 'tying' contract is entered into between the manufacturer and the local dealer concerning any commodity, the exclusive or 'tying' contract gives both the manufacturer and the local dealer a complete monopoly of that particular commodity in the locality or community. That the effect of such a system is detrimental to the consumers and to the general public cannot be questioned for a moment.

"The public is compelled to pay a higher price, and local customers are put to the inconvenience of securing many commodities in their communities or through mail-order houses that cannot be procured at their local stores. The price is raised as an inducement. This is the local effect. Where the concern making these contracts is already great and powerful, * * * the exclusive or 'tying' contract made with local dealers becomes one of the greatest agencies and instrumentalities of monopoly ever devised by the brain of man. It completely shuts out competitors, not only from trade in which they are already engaged, but from the opportunities to build up trade in any community where these great and powerful combinations are operating under this system and practice. * * * When we consider contracts of sales made under this system, the result to the consumer, the general public, and the local dealer and his business, is even worse than under the lease system."

For present purposes the fact that this section was amended in conference before final enactment we regard as of little or no significance. The reports of the two committees illuminate the evils and dangers in the trade situation with which Congress was undertaking to deal. As frequently happens, debate and conference modified the legislators' views as to the best method of dealing with the evils aimed at. But we find no abandonment of the main purpose expressed in these committee reports. Restrictions of this sort that may substantially lessen competition or tend to create a monopoly are condemned as strongly in the final as in the original draft. Competition, actual or potential, was the object of the Congressional solicitude.

But we do not think it necessary to resort to the reports of the congressional committee or to debates in Congress in order to reach a confident conclusion as to the application of this statute to the contract between the plaintiff and defendant. Section 3 (Comp. St. § 8835c) reads as follows:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

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The contract now before the court provides in the plainest possible language that the purchaser shall not "sell or permit to be sold * * * on its premises * * * any other make or pattern, and not to sell Standard patterns except at label prices." In effect the plaintiff admits that the only way of escape from the condemnation of the statute is for the court to hold that this negative covenant may not "substantially lessen competition or tend to create a monopoly."

No such finding can be made. Observe at the outset that the condemnation of the statute runs, "where the effect of" such negative covenant "*may be* to substantially lessen competition or *tend* to create a monopoly." The language is "*may* be," not "is" or "will be."

In order to condemn the negative covenant, it is not necessary that the court should find that it *will* lessen competition or *will* tend to create a monopoly; it is enough to find that it *may* lessen competition or *may tend* to create a monopoly.

On this record we are constrained to find that this restriction may substantially lessen competition and may tend to create a monopoly. It already appears that, out of some 52,000 pattern agencies in this country, the plaintiff or a holding company controlling it and two other pattern companies control approximately two-fifths. The restriction of each merchant to one pattern manufacturer must in hundreds, perhaps in thousands, of small communities amount to giving such single pattern manufacturer a monopoly of the business in such community. Even in the larger cities, to limit to a single pattern maker the pattern business of dealers most resorted to by customers whose purchases tend to give fashions their vogue, may tend to facilitate further combinations; so that the plaintiff, or some other aggressive concern, instead of controlling two-fifths, will shortly have almost, if not quite, all the pattern business.

We must consider this restriction in the light of the facts peculiar to the business to which the restraint is applied, to the conditions already achieved under such restraint, as well as the nature of the restraint and its effect, actual or probable. Viewing it thus, in the light of the surrounding circumstances, we are constrained to agree with the District Court that the negative covenant in this contract may lessen competition, or may tend to create a monopoly, or both, and is therefore obnoxious to the Clayton Act. See Chicago Board of Trade v. United States, 246 U. S. 231, 238, 38 Sup. Ct. 242, 62 L. Ed. 683.

To avoid possible misconception of this opinion, we add that we do not overlook that the contract in question also contains a stipulation to maintain resale prices. The validity of this provision is not raised by the pleadings, nor has it been discussed by counsel. Whether under the circumstances of this case such resale price stipulation is invalid, we do not decide. Bauer v. O'Donnell, 229 U. S. 1, 33 Sup. Ct. 616, 57 L. Ed. 1041, 50 L. R. A. (N. S.) 1185, Ann. Cas. 1915A, 150; Dr. Miles Medical Co. v. Park & Sons Co., 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502; Ford Motor Co. v. Union Motor Sales Co., 244 Fed. 156, 156 C. C. A. 584; Strauss v. Victor Talking Machine Co., 243 U. S. 490, 37 Sup. Ct. 412, 61 L. Ed. 866, L. R. A. 1917E, 1196, Ann. Cas. 1918A, 955; Motion Picture Co. v. Universal Film Co., 243

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U. S. 502, 37 Sup. Ct. 416, 61 L. Ed. 871, L. R. A. 1917E, 1187, Ann. Cas. 1918A, 959; United States v. Kellogg Toasted Corn Flake Co. (D. C.) 222 Fed. 725, 728, Ann. Cas. 1916A, 78; Boston Store v. American Graphophone Co., 246 U. S. 8, 38 Sup. Ct. 257, 62 L. Ed. 551, Ann. Cas. 1918C, 447.

Our decision that the negative covenant cannot be enforced is enough to dispose of this case as a suit in equity. The pleadings do not raise, and we have not undertaken to consider and determine, the question of what rights, if any, the plaintiff may have, in some other action, to recover either for goods sold and delivered, or for damages for breach of the contract. Whether the invalid negative covenant and the resale price stipulation, either or both, taint the whole contract, and all sales made in the course of the business contemplated by such contract, we do not decide. See Continental Wall Paper Co. v. Voight, 212 U. S. 227, 29 Sup. Ct. 280, 53 L. Ed. 486; Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679; Wilder v. Corn Products Co., 236 U. S. 169, 35 Sup. Ct. 398, 59 L. Ed. 520, Ann. Cas. 1916A, 118; McMullen v. Hoffman, 174 U. S. 639, 19 Sup. Ct. 839, 43 L. Ed. 1117; Roselle v. Beckemeir, 134 Mo. 380, 35 S. W. 1132; Fishell v. Gray, 60 N. J. Law, 5, 37 Atl. 606; Rosenbaum v. U. S. Credit Co., 65 N. J. Law, 255, 48 Atl. 237, 53 L. R. A. 449; King v. King, 63 Ohio St. 363, 59 N. E. 111, 52 L. R. A. 157, 81 Am. St. Rep. 635; 1 Parsons on Contracts (9th Ed.) p. 496; Wald's Pollock on Contracts, p. 484, and cases and notes; Pullman Car Co. v. Transportation Co., 171 U. S. 138, 151, 18 Sup. Ct. 808, 43 L. Ed. 108; Harriman v. Northern Securities Co., 197 U. S. 244, 25 Sup. Ct. 493, 49 L. Ed. 739; Bone v. Ekless, 5 H. & N. 924; Thomas v. Richmond, 12 Wall. 349, 356, 20 L. Ed. 453; Boylston Bottling Co. v. O'Neil, 231 Mass. 498, 121 N. E. 411, a decision by the Massachusetts Supreme Judicial Court on January 2, 1919.

The decree of the District Court is affirmed, with costs.

BROWN, District Judge (concurring). Full weight must be given to the final clause of section 3 of the Clayton Act—"where the effect of such lease, sale, or contract for sale, or such condition, agreement, or understanding, may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

In determining the effect we must consider the thing upon which the effect is to be produced. This clause seems to require that the interpretation and application of section 3 of the Clayton Act should be according to the principles stated in the opinion of Mr. Justice Brandeis in Chicago Board of Trade v. United States, 246 U. S. 231, 238, 38 Sup. Ct. 242, 244 (62 L. Ed. 683):

"But the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates, and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint, and its effect, actual or

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probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences."

To predict the consequences of the defendant's agreement not to sell or permit to be sold on its premises, during the term of the contract, any other make of patterns, it is necessary to consider the peculiarities of the particular business to which the contract relates. We must also consider that the restraint is upon the use of the premises of the defendant for a limited period. See 251 Fed. 559, 560, 163 C. C. A. 553. It is evident that a restriction of this character did not constitute an inducement to the defendant to enter into the contract for carrying a stock of the plaintiff's goods. It is also evident that, so long as the defendant remained satisfied to carry only the single line of dress patterns that it had chosen, the agreement not to carry another line of goods was of no practical effect. It is operative to exclude competitors only in those cases where a customer may desire to add a second stock or to abandon his contract during its term. Of the exclusion of competitors which results from the fact that the wants of customers are supplied by the plaintiff, no complaint can be made.

The misapprehension as to the actual or probable effect of restrictions of this character as a means of introducing goods to the trade and of building up a monopoly was pointed out by the Supreme Court in United States v. United Shoe Mchry. Co., 247 U. S. 32, 66, 38 Sup. Ct. 473, 485 (62 L. Ed. 968):

"Besides, it is impossible to believe, and the court below refused to find, that the great business of the United Shoe Machinery Company has been built up by the coercion of its customers, and that its machinery has been installed in most of the large factories of the country by the exercise of power, even that of patents. The installations could have had no other incentive than the excellence of the machines and the advantage of their use, the conditions imposed having adequate compensation and not being offensive to the letter or the policy of the law;"

and by the court in United States v. United Shoe Mchry. Co. of N. J, et al. (D. C.) 222 Fed. 349, 414:

"It is impossible to believe that defendants' equipment is in so many shoe factories for any other substantial reason than the merits of what they have had to offer. To say that this is due, in any substantial degree, to the fact that its leases run beyond the terms of patents, or because of the exclusive use, prohibitive, or cancellation clauses, rests largely, if not entirely, upon assumption. But that the business of these defendants rests upon the lease provisions objected to in such a substantial amount as to constitute any factor of independent force in securing or maintaining a monopoly does not appear."

This was said in connection with contracts of a duration as long as 17 years, and applies with especial force to short-term contracts like that before us. It also was said in the opinion in that case (222 Fed. 407):

"A business contract, like a statute, is not to be upset 'upon hypothetical and unreal possibilities if it would be good upon the facts as they are.' Pullman v. Knott, 235 U. S. 23, 35 Sup. Ct. 2, 59 L. Ed. 105."

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In applying the statute it must be judicially determined what the effect may be. This judgment must be more than a mere feeling of "possibility" arising in ignorance of facts which, if known, would destroy that feeling. It must be based on knowledge and upon a reasonable belief that, in view of existing facts, there is a "dangerous probability."

In the present case there is no evidence that any competitor of the plaintiff had ever been excluded from competition in the city of Boston or elsewhere because of inability to procure customers or a store in which he might market his goods. If the defendant desired to defend upon the ground that this contract, by reason of its effect upon the trade, was illegal, it was incumbent upon it to allege and prove such facts as would enable the court to make a reasonable prediction of consequences. Ford Motor Co. v. Benjamin E. Boone, Inc., 244 Fed. 335, 342, 156 C. C. A. 621. No such defense is made by the answer.

The defendant sets up in its answer that the plaintiff is a combination in restraint of trade, and that it is seeking an injunction against the defendant for the purpose of preventing competition and to establish a monopoly. The answer that the plaintiff is an unlawful combination of course states no defense.

The facts before us were brought out principally in the direct testimony of the plaintiff and upon cross-examination. They tend to show that the ordinary purchaser from the plaintiff is required to maintain a considerable stock of dress patterns, which soon go out of style, and have to be renewed by exchange, and that a single stock meets all the requirements of the ordinary dealer at retail. This being the case, the exclusion of competitors would presumably result from the fact that the plaintiff's customers were supplied, and did not desire to duplicate their stocks, but preferred to concentrate their efforts on the goods of their choice, rather than from any agreement not to handle the goods of others. It also appears that there are but few stores which handle more than one line of dress patterns, and that in some cases special contracts are made permitting it.

From the history of this clause of the Clayton Act to its final form it is quite evident that Congress rejected various drafts which would make a contract of this character void upon its face, and that the final clause was inserted to prevent the disturbance that might result to long-established methods of business by an indiscriminate condemnation of a large body of existing contracts because of their verbal form, irrespective of their actual or probable effect, and in recognition of the fact that where there is an established monopoly competition cannot be instituted or maintained unless the new competitor in the field can make a contract with some one to handle only its own goods and not to handle the goods of a company already dominating the field; that if such contracts were to be condemned irrespective of the trade in which they were made this might lead to effective suppression of competition, by enabling an established monopoly to place its goods in the shop of every competitor.

I am of the opinion that this court should not, upon this record and upon so incomplete a state of proofs, determine the invalidity of this

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contract. The question of the plaintiff's right, at the time of bringing his bill, to an injunction to restrain a breach of the negative agreement concerning the use of the premises, in spite of the authorities cited, is still very doubtful on principle.

The doctrine of Lumley v. Wagner, 1 DeG., M. & G. 604, has been much questioned. Lindley, L. J., said he looked upon Lumley v. Wagner "as an anomaly which it would be dangerous to extend." See Fry on Specific Performance (5th Ed.) §§ 860, 861, 862. In sections 857 and 858 the difficulties in distinguishing between express and implied negatives are discussed. So far as the negative agreement is not to do that which as a matter of fact is inconsistent with an affirmative and lawful agreement, it may be regarded as mere surplusage. It is only where the negative agreement goes beyond what is inconsistent with an affirmative and lawful agreement that it can be regarded as unreasonable. That a court of equity, while recognizing its inability to compel specific performance of a contract, should, nevertheless, by injunction, put compulsion upon a defendant who is answerable at law for his breach of contract, may result merely in the imposition of a penalty; and penalties are not favored in equity. The defendant's agreement not to use its premises for the sale of the goods of others was to fortify the agreement to "pay proper attention to the sale of plaintiff's patterns and to conserve the best interests of the agency at all times."

Ordinarily a party to a business contract for the purchase of goods may elect to break his contract and pay full damages. For a court of equity to put compulsion upon him by way of punishment for refusing to perform the contract is beyond its powers, and to attempt coercion without power to make it effective is too doubtful an experiment. In view of the decision of the Supreme Court in Javierre v. Central Altagracia, 217 U. S. 502, 30 Sup. Ct. 598, 54 L. Ed. 859, it is doubtful if the Supreme Court will approve the extension of the doctrine of Lumley v. Wagner to a contract like that involved in the present case.

I am of the opinion that on the present record we cannot properly determine that the contract is invalid under the Clayton Act. The statute does not create a presumption that such contracts are inherently vicious, nor does it impose upon the plaintiff the burden of proving that the contracts are not illegal. The presumption is of legality, and the burden is upon him who asserts illegality. The application of the statute should be made only upon full proofs. The consequences of applying it otherwise are too serious to be disregarded. The power of Congress to enact this statute is based upon the power to regulate interstate commerce. It may make an interstate contract illegal by reason of the incorporation therein of conditions relating to commerce of a purely local character, not within the power of Congress to regulate when not associated with an interstate contract. It would seem to follow that we cannot separate from the interstate commerce features of the contract the features that relate to a business wholly local, and nullify those features only, since this is directly inconsistent with the theory that by virtue of their connection with an interstate commerce contract Congress, in the exercise of its power over interstate com-

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merce, may, provide that "it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale * * * on the condition," etc.

In view of the long continuance and wide extension of the method of doing business, through what the Supreme Court in Willcox & Gibbs Co. v. Ewing, 141 U. S. 627, 12 Sup. Ct. 94, 35 L. Ed. 882, regarded as agency contracts, and of the long-established trade usage of describing such contracts as agency contracts, irrespective of the fact that the title to the goods may pass from vendor to vendee, there must be a large body of outstanding contracts which might be so completely nullified that no recovery can be had by the vendors for goods that they have furnished under such contracts. It was not the intent of Congress to afford to persons who desire to escape from their contracts technical and merely verbal grounds to excuse a breach of contract.

It should be remembered that contracts in usual form, containing no negative agreements, are means of establishing monopolies and suppressing competition quite as effective as contracts containing negative agreements. Whether the expression is positive or negative is largely a mere matter of form. The effective means of establishing a monopoly is to get contracts to purchase goods. This must precede any agreement restricting the sale of other goods. The restrictive agreements may or may not have an effect according to the circumstances. Under some circumstances they may be an effective means for breaking a monopoly by instituting or maintaining competition. In the present case there is evidence that the largest competitor of the plaintiff is rapidly extending its business by affirmative contracts without restrictive conditions, and has a much more dominating position in the field than the present plaintiff. I can see no ground in the record for apprehension that anybody is likely to acquire a monopoly in the dress pattern business, in which, as the evidence shows, competition is very active.

I am unable to agree that this bill should be dismissed because the contract in question is unlawful under the Clayton Act. I concur in the result for the reason that I am of the opinion that the plaintiff, upon the filing of the bill, was not entitled to an injunction as a means of coercing the defendant to perform the principal contract to which the negative agreement was merely a subordinate and dependent provision, and for the reasons stated in our former opinion.

(259 Fed. 803)

BOYLE v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. April 4, 1919. Rehearing Denied June 30, 1919.)

Nos. 2573–2585, 2590.

1. MONOPOLIES ⟹31—INDICTMENT—SUFFICIENCY.

An indictment under section 1 of the Sherman Anti-Trust Act (Comp. St. § 8820) need not set forth the means by which the conspiracy was accomplished where the object itself was unlawful.

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2. MONOPOLIES ⟹29—CRIMINAL PROSECUTION—INTERSTATE TRADING.

Where defendants combined to prevent certain electrical appliances from being transported to Chicago, the mere fact that they intended to accomplish this result by interfering with the installation of the apparatus in Chicago does not relieve the offense of its interstate character so as to preclude prosecution under the Sherman Anti-Trust Act.

3. MONOPOLIES ⟹12(2)—BOYCOTT—COMBINATION BETWEEN EMPLOYER AND EMPLOYÉ.

Evidence that employers agreed to increase wages if employés prevented any but union switchboards being used in Chicago, that employés accomplished such result by boycotting concerns using switchboards manufactured in other places, etc., *held* to sustain a conviction of both employers and employés for violating the Sherman Anti-Trust Act.

4. CRIMINAL LAW ⟹149—LIMITATIONS.

In a prosecution under the Sherman Anti-Trust Act for unlawfully conspiring to restrain trade, the statute of limitations does not run from the time the combination was originally made, but only from the time a conspirator indicates his withdrawal from the combination by some affirmative act.

5. MONOPOLIES ⟹31—CRIMINAL PROSECUTION—VARIANCE.

In a prosecution under the Sherman Anti-Trust Act, there is no variance between an indictment that defendants combined to prevent the installation of any electrical appliances not manufactured by them in a certain city, and proof that the combination related only to certain specified appliances.

6. CRIMINAL LAW ⟹423(3)—ADMISSION OF EVIDENCE—ACTS OF COCONSPIRATORS.

In a prosecution under the Sherman Anti-Trust Act against employers and employés for conspiring to prevent any but union-made switchboards being installed in Chicago, evidence that a defendant trade-unionist exacted payments from builders installing other switchboards as a condition of not calling strikes, etc., *held* admissible as an act of one coconspirator in furtherance of the object of the conspiracy.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Michael Boyle, Frank A. Lundmark, Raymond Cleary, Warren Ripple, Gustave W. Berthold, Otis B. Duncan, Charles J. Peterson, Charles Kreider, the Cuthbert Electrical Manufacturing Company, Henry Newgard & Co., John Cuthbert, the Electrical Apparatus Company, Julian J. Nielsen, and James Obermiller, were convicted of violating the Sherman Anti-Trust Act, and separately bring error. Affirmed.

Plaintiffs in error were convicted of a violation of section 1 of the so-called Sherman Anti-Trust Act (Act July 2, 1890, c. 647, 26 Stat. 209 [Comp. St. § 8820]). The indictment included nine counts, four charging conspiracy, three, combination, and two, contract, all to restrain trade or commerce among the several states.

Prior to 1910 certain manufacturers located outside of the city of Chicago were engaged in making switch and panel boards and other electrical appliances which were sold and shipped in interstate commerce finding a market in Chicago. Other of the plaintiffs in error were either officers and agents of the home manufacturing companies or of the labor unions. Prior to 1910 all products were made by nonunion labor.

In 1909 efforts were made to unionize the shops of the Chicago manufacturers, a detailed statement of the campaign being unimportant. The employers insisted that they could not compete with the foreign manufacturer who employed nonunion labor. As a result strikes were called—some shops

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were unionized, others held out. At this point a conference was arranged and a plan proposed to avoid the competition of nonunion shops. On or about April 1, 1911, an agreement was reached between the manufacturing companies and the representatives of the labor unions whereby the shops were unionized and a scale of wages adopted. The government contends that the agreement also unlawfully provided for the restraint of interstate trade by eliminating the competition of the foreign manufacturer. This elimination of competition was to be accomplished by means of coercion, boycott, threat of strike, and destruction of property wherever switchboards or panel boards made by the foreign corporations were installed. The agreement as reduced to writing expired at the end of a year, but new agreements were subsequently made. During the period covered by the indictment very few switchboards made by the manufacturers outside of Chicago found their way into the city. The malicious destruction of property and the interference with the work of construction were effective weapons that eliminated outside competition. Plaintiffs in error denied making any agreement that was unlawful or that called for anything but a bona fide effort to unionize all shops in and out of Chicago engaged in making electrical appliances, and especially denied that the agreement contemplated any destruction of property, the use of the boycott or blackmail, etc.

Error is assigned:

(a) In overruling the demurrer to the indictment.

(b) In admitting evidence over objections.

(c) In denying the motion for a directed verdict.

Albert Fink, John S. Miller, and David D. Stansbury, all of Chicago, Ill., for plaintiffs in error.

Charles F. Clyne and Albert L. Hopkins, both of Chicago, Ill., and Robert T. Neill, of El Paso, Tex., for the United States.

Before BAKER, MACK, and EVANS, Circuit Judges.

EVANS, Circuit Judge (after stating the facts as above). Section 1 of the Anti-Trust Act reads:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal."

The government charged plaintiffs in error (in four counts) with a conspiracy to restrain trade or commerce among the several states (in three counts), with a combination to restrain such trade, and (in two counts) with a contract to restrain such trade.

[1] Plaintiffs in error contend that none of the counts set forth an offense under the statute; it being claimed, among other contentions, that the means by which the object of the conspiracy or combination was to be accomplished were not set forth. Without considering the means that are set forth in the indictment, it is sufficient to say that the pleader was not required to set forth any means. Where the object of the conspiracy is unlawful, as in this case, it is unnecessary to set forth the means by which the object is accomplished. Jelke v. United States, 255 Fed. 364, 166 C. C. A. 434.

[2] It is also claimed that the government failed to show that the object of the combination was to interfere with interstate trade; that it affirmatively appeared that the object was to prevent the installation in Chicago of certain electrical appliances, an alleged intrastate transaction. This contention is contrary to the ruling of the court in East-

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ern States Retail Lumber Dealers' Association v. United States, 234 U. S. 600, 34 Sup. Ct. 951, 58 L. Ed. 1490, L. R. A. 1915A, 788; United States v. Patten, 226 U. S. 525, 33 Sup. Ct. 141, 57 L. Ed. 333; Loewe v. Lawlor, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815; Lawlor v. Loewe, 235 U. S. 522, 35 Sup. Ct. 170, 59 L. Ed. 341; Montague & Co. v. Lowry, 193 U. S. 38, 24 Sup. Ct. 307, 48 L. Ed. 608. In the first Lawlor Case the court announces the rule in the following language:

"If the purposes of the combination were, as alleged, to prevent any interstate transportation at all, the fact that the means operated at one end before physical transportation commenced and at the other end after the physical transportation ended was immaterial."

There can be no question but what the government charged the plaintiffs in error with a combination—

"the nature of which is now here described, to restrain said trade and commerce of said concerns, corporations and firms located in states other than the state of Illinois, in the manner and by the means now here set forth."

Then follows a statement of the means by which the object was to be accomplished, namely:

"Said defendants were to hinder, restrain, and prevent the installation in the city of Chicago of any electrical appliances not manufactured by the members of the said association in said city of Chicago," etc.

The object of the combination being to prevent interstate transportation (that is, prevent the shipment of switchboards, etc., from a point outside the state of Illinois to the city of Chicago), the mere fact that the means by which this object was to be accomplished was limited to interference with their installation in Chicago cannot relieve the transaction of its interstate character.

[3] Does the evidence support the verdict? It is hardly necessary to restate all of the evidence upon which the government relied in answer to this challenge made by the plaintiffs in error. An examination of the record convinces us that there is credible evidence in the record sufficient to support the verdict. That the parties entered into a combination, that they reduced their agreement in part to writing, is conceded. That the parties combined to restrain the shipment of commodities from points outside of the state of Illinois to the city of Chicago is fairly inferable from a part of the written agreement. The employers were anxious to avoid competition from nonunion shops. The employés desired to unionize the shops. They agreed that:

"This increase in scale is to go into effect only in case the party of the second part has succeeded before October 1, 1911, in bringing about a condition which will permit of none but union label switchboard work to be installed in the city of Chicago."

While the practices by which the second party was to bring about this result were not set forth, it is at least inferable even from this agreement alone that outside made switchboards would not be installed in the city of Chicago. Plaintiffs in error, and particularly the manufacturing companies, insist, however, that the agreement above quoted is capable of a construction consistent with their inno-

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cence; that they understood the second party was to unionize the shops outside of the city of Chicago and thereby competition from nonunion labor would be eliminated. While this is hardly the fair or rational conclusion to be drawn from this language, the contract is by no means all of the evidence in the case. The written agreement was merely a part of the evidence in the case. Witnesses testified orally to the entire agreement and understanding of the parties, and the jury and not this court must determine the weight of this testimony.

The reasons which actuated the parties to thus conspire and combine may have been and doubtless were quite different. The manufacturer was induced to enter into the agreement because of a desire to eliminate competition. He also wanted to settle his labor problem. The representatives of the unions were actuated by a different motive. But it was not the motive, but the common and concerted action of the parties for the unlawful purpose of restraining interstate commerce for which plaintiffs in error were indicted and convicted.

[4] Nor was the government barred by the statute of limitations. Plaintiffs in error were not tried for entering into the written contract of April 1, 1911, but were convicted of the unlawful conspiracy to restrain trade which was a continuing conspiracy or combination. While the parties entering into such unlawful combination might have withdrawn from such combination and thereby have relieved themselves from further liability, and the statute of limitations would have begun to run from the time of such withdrawal, yet it required some affirmative act on the part of the conspirators to avoid the liability which their entry into the combination created. Hyde v. United States, 225 U. S. 347, 32 Sup. Ct. 793, 56 L. Ed. 1114, Ann. Cas. 1914A, 614; United States v. Kissel, 218 U. S. 601, 31 Sup. Ct. 124, 54 L. Ed. 1168.

[5] Variance: Plaintiffs in error assert that, because the pleader charged them with combining to prevent "the installation in the city of Chicago of any electrical appliances not manufactured by said associations in the city of Chicago," etc., there is a fatal variance because the proof merely showed that plaintiffs in error combined to prevent the installation in the city of Chicago of certain electrical appliances, to wit, switch and panel boards made by nonunion labor.

Although relied on by each plaintiff in error, and the argument in support thereof repeated in each of the briefs, this contention does not impress us other than as a "grasp at straws." Accepting the position most favorable to plaintiffs in error, there is no variance. The government merely failed to meet its allegations as broadly as alleged.

If a conspiracy to rob a post office of all its stamps were charged in an indictment, could it be seriously urged that there was a fatal variance, or even failure of proof, if the prosecution merely proved a conspiracy to rob the post office of its postage stamps? We think not. Proof tending to show plaintiffs in error interfered with interstate commerce by preventing the shipment of switchboards and panel boards into Chicago is likewise not at variance with an allegation that the parties conspired to prevent the shipment into Chicago of all electrical appliances.

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[6] Complaint is also made because of the admission of evidence over objection. The government introduced testimony showing that plaintiff in error Boyle on various occasions made builders pay him considerable sums of money under threat of a strike or a boycott. For example, one witness testified that he had paid Boyle $500 to get a certain switchboard installed; another, that Boyle exacted of him $3,000 in order that he might install a certain switchboard; and still another testified that Boyle required a church to pay $200 as a penalty for installing certain electrical apparatus. Still another witness testified that Boyle exacted a payment of $20,000 in order to get immunity from strikes, etc., and at a time when there was no difficulty whatever between the builder and the employés. Plaintiffs in error contend that this evidence was not only inadmissible but highly prejudicial to their cause.

That such testimony, if erroneously admitted, was prejudicial, must be conceded. For it requires no stretch of the imagination to conceive of a jury taking a prejudice against a party who is thus pictured in the role of a blackmailer, a highwayman, a betrayer of labor, and a leech on commerce. But the test of admissibility does not turn upon its effect upon the jury, but on its relevancy to the issues made by the charges set forth in the indictment.

The government charged a conspiracy or combination to restrain interstate commerce. A prima facie case of conspiracy was established. Boyle was one of the coconspirators. As the object of the conspiracy, switchboards and panel boards made outside of Chicago were not to find a market in the city of Chicago. This object—this interference with interstate commerce—was to be brought about by threatened strikes, by boycotts, or by the exaction of graft to prevent strikes and boycotts. What more direct or immediate restraint upon the sale and installation of switchboards and panel boards made outside of Chicago than a burden of $3,000, or $5,000 upon the builder who sought to install them? It was as effective a means of preventing their installation in Chicago as threatened strikes. The testimony was receivable as an act of one of the coconspirators in furtherance of the object of the conspiracy.

Nor does the evidence justify the claim that the $20,000 payment was in no way connected with the installation of switchboards or panel boards. The Chicago Telephone Building was in the course of construction. The architect had specified switchboards made outside of Chicago. Boyle prevented the contractor from securing electricians. It is true the $20,000 was paid by the builder to purchase his entire peace but included noninterference in the installation of switchboards as well as noninterference in the construction of the entire building. The items were not separated. The $20,000 was paid by checks at various times and with the understanding on the part of the builder that he could proceed without strikes or molestation. But a part of the consideration for this payment was unquestionably the permission to install switchboards that the architect designated and which the builder preferred.

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The court instructed the jury that the action or statements of one of the plaintiffs in error were not binding unless the jury found that a conspiracy existed. Under these circumstances, and for the purpose for which it was offered, this testimony was admissible.

Other assignments of error were made which we have duly considered, but they do not warrant separate consideration.

The judgment is affirmed.

(259 Fed. 809)

MALLEY, Collector, v. BOWDITCH et al.

(Circuit Court of Appeals, First Circuit. July 29, 1919.)

No. 1365.

1. INTERNAL REVENUE ⟹19(1)—STAMP TAXES—CERTIFICATES OF STOCK.

Within War Tax Law Oct. 22, 1914, § 5, Schedule A, imposing a stamp tax of 5 cents on each $100 of face value, or fraction thereof, of certificates of stock issued by any association, company, or corporation, such tax must be paid on certificates of shares issued by a manufacturing company organized in the form of a trust under the common law and deriving none of its rights, benefits, or qualifications from any statute, and which was not an ordinary common-law real estate trust; for, if the word "association" be not broad enough to include the concern, it is included in the expression "company," while the phrase "certificates of stock" discloses no intent to exclude common-law associations or companies, but evidences a legislative purpose to impose a stamp tax on certificates of stock as muniments of title.

2. INTERNAL REVENUE ⟹19(1)—STAMP TAXES—VALIDITY.

War Tax Law Oct. 22, 1914, § 5, Schedule A, imposing a stamp tax of 5 cents on each $100 of face value, or fraction thereof, of certificates of stock issued by any company, association, or corporation, is not invalid in its application to a manufacturing company organized as a trust at common law, on the theory that it was inapplicable to other associations, for the taxes were merely on the muniments of title, and if other associations do not issue such muniments of title they are therefore not taxable.

In Error to the District Court of the United States for the District of Massachusetts; George H. Bingham, Judge.

Action by Charles P. Bowditch and others, trustees, against John F. Malley, collector. There was a judgment for plaintiffs, and defendant brings error. Reversed and remanded, with directions to enter judgment for defendant.

Francis G. Goodale, Sp. Asst. U. S. Atty., of Boston, Mass. (Thomas J. Boynton, U. S. Atty., of Boston, Mass., on the brief), for plaintiff in error.

Burton E. Eames, of Boston, Mass. (William C. Rice and Tyler, Tucker, Eames & Wright, all of Boston, Mass., on the brief), for defendants in error.

Before JOHNSON, Circuit Judge, and ALDRICH and BROWN, District Judges.

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BROWN, District Judge. [1] We are of the opinion that, on the original issue of the certificates of shares of the Pepperell Manufacturing Company, a manufacturing company organized in the form of a trust under the common law, and deriving none of its rights, qualities or benefits from any statute, there was required by the provisions of section 5, Schedule A, of the War Tax Law, so called, approved October 22, 1914 (38 Stats. pt. 1, pp. 745, 753, 759, c. 331), a stamp tax of 5 cents on each $100 of face value or fraction thereof.

By the agreement and declaration of trust it was provided:

> "The capital of this trust shall be seven million six hundred and sixty-eight thousand dollars ($7,668,000), divided for the purpose of issuing certificates into 76,680 shares, of the par value of one hundred dollars ($100) each."

There was thus provided a share capital as a basis for the issue of transferable certificates evidencing a proportional interest therein and carrying with them certain rights while the company is a going concern and in its winding up.

The defendants in error, the trustees, contend that these certificates are not "certificates of stock."

The word "stock," however, is to be interpreted in connection with the accompanying words of the statute, "association, company, or corporation." It is a term not peculiar to corporations, but a term equally applicable to the share capital or fund created by or in accordance with an agreement for the formation of an unincorporated association or company.

The contention of the trustees, that "legislative action is essential to the creation of 'capital stock'" is erroneous. If there is a distinction between the "capital" and the "capital stock" of corporations, in that the capital stock is fixed by the charter of a corporation, but that the capital used in its business may be either larger or smaller, there may be a like distinction between the joint stock or share capital of a partnership or association, as fixed by the agreement of the partners, and the full amount of its property. Lindley on Partnership (8th Eng. Ed.) 382 et seq.

In Bankruptcy Act Aug. 19, 1841, c. 9, § 14, 5 Stat. 448, and Act March 2, 1867, c. 176, § 36, 14 Stat. 534, the term "joint stock" was used to describe partnership assets. Collier on Bankruptcy (11th Ed.) pp. 1550, 1535. In Berthold et al. v. Goldsmith, 24 How. 541, 16 L. Ed. 762, the term "capital stock" was used in the same sense.

An "association" or "company," equally with a corporation, may have a share capital distinct from its actual capital or property, irrespective of whether it is formed in a state without regulating statutes, or in a state where by statute it is regulated and given some of the characteristics of a corporation. The present statute, by the use of the terms "association" and "company," covers those formed under the common law as well as those formed under or regulated by statute.

It seems to us clear that the words "certificates of stock" contain no implication of an intent to exclude common-law associations or companies.

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A certificate evidencing a transferable share or shares in the share capital of a manufacturing company, whether incorporated, quasi incorporated, or wholly unincorporated, is properly described as a "certificate of stock."

By agreement the certificates in question were issued as evidence of shares of a fixed capital, divided into a fixed number of shares, of the par value of $100 each.

We are called upon to apply a statute imposing stamp taxes on documents of a certain class, and which assumes that these documents may be issued, not only by corporations, but by associations and companies. These may have this in common—a share capital of fixed amount. Whether the share capital is fixed by agreement or under statutory authority seems immaterial, for the tax is not a franchise tax or a corporation tax, but a stamp tax or document tax.

The differences between corporations and unincorporated associations being considered immaterial to the imposition of a stamp tax on documents, the different modes of realizing upon the shares of incorporated or unincorporated companies by the certificate holders must also be regarded as immaterial. Having that feature of resemblance which the statute fixes upon as the test of the imposition of a stamp tax, the difference between these different bodies which are named in the statute has become immaterial to the question before us.

[2] The suggestion of constitutional difficulties in adopting the construction for which the collector contends, and which we think right, does not seem of weight. It involves "no distinction founded upon an immaterial difference between two kinds of partnerships," since the stamp tax is contingent upon the original issue of "certificates of stock," just as a stamp tax on checks is contingent upon the issuing of checks.

A stamp tax on documents discriminates between those who do and those who do not issue documents; and a distinction between unincorporated companies and associations which do and those which do not issue certificates of shares of stock is not unreasonable, nor founded upon an immaterial difference between two kinds of partnerships. Thomas v. United States, 192 U. S. 363, 371, 24 Sup. Ct. 305, 48 L. Ed. 481; Hatch v. Reardon, 204 U. S. 152, 158, 159, 27 Sup. Ct. 188, 51 L. Ed. 415, 9 Ann. Cas. 736.

The Massachusetts cases cited (Gleason v. McKay, 134 Mass. 419; Minot v. Winthrop, 162 Mass. 113, 38 N. E. 512, 26 L. R. A. 259; Opinions of Justices, 196 Mass. 603, 85 N. E. 545) in our opinion do not give rise to any constitutional difficulty. The opinion of Chief Justice Rugg (196 Mass. 619, 620, 85 N. E. 545) tends to support the view that the words "association" and "company" include organizations not regulated by statute, and that a statute including these in an excise tax does not involve a discrimination founded on an immaterial difference.

Nor do we regard it useful to consider whether the right of the certificate holder or shareholder is a chose in action or in the nature of a chose in action, or an equitable interest in property.

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The certificate is but a muniment of title—documentary evidence of ownership—and not the share itself.

The thing taxed is not a chose in action, though it may be evidence of it. In a remote sense both a share of corporate stock and a certificate of a share in an unincorporated company may be said to represent an interest in property. It is equally true that both may represent an interest in a share of a capital fixed in amount, whether fixed by statute or by agreement.

In Eliot v. Freeman, 220 U. S. 178, 31 Sup. Ct. 360, 55 L. Ed. 424, construing the Corporation Tax Law (Act Aug. 5, 1909, c. 6, 36 Stat. 11), it was held that the tax was imposed upon doing business in a corporate or quasi corporate capacity. But that case is clearly distinguishable from the present case, since the present statute does not impose a franchise tax, but imposes a stamp tax upon various kinds of documents, which may be issued by companies neither incorporated nor quasi incorporated, "or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them are written or printed," etc. See section 5, 38 Stat. pt. 1, p. 753.

In interpreting the statute we find no sufficient reason for limiting the terms "association" and "company" to those which derive their powers from legislation.

We have examined, also, the opinion of the Supreme Court in Crocker et al. v. Malley, March 17, 1919, 249 U. S. 223, 39 Sup. Ct. 270, 63 L. Ed. 573, reversing the judgment of this court. In that case the Supreme Court found that—

> "The declaration of trust on its face is an ordinary real estate trust of the kind familiar in Massachusetts, unless in the particular that the trustees' receipt provides that the holder has no interest in any specific property and that it purports only to declare the holder entitled to a certain fraction of the net proceeds of the property when converted into cash 'and meantime to income.'"

It was stated, however, in that case:

> "The function of the trustees is not to manage the mills, but simply to collect the rents and income of such property as may be in their hands," etc.

Under the present declaration of trust it is provided that the name of the trust shall be Pepperell Manufacturing Company, and the trustees may be so designated, and in that name the trustees shall, so far as practicable, conduct the business of the trust; that the trustees shall employ and use the trust property and assets in the carrying on of the business of manufacturing textile or other fabrics, etc. This is essentially different from an ordinary real estate trust of the kind familiar in Massachusetts. If, under the decision of the Supreme Court, there may be doubt whether the term "association" is applicable, there seems no ground for serious doubt of the applicability of the term "company," used in the statute and made a part of the name and description of those persons who are to conduct the manufacturing business of the organization.

In applying this stamp tax we find no substantial reason for a dis-

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tinction between this textile manufacturing company and other textile manufacturing companies.

The judgment of the District Court is reversed, and the case will be remanded to that court, with direction to enter judgment for the defendant, and the plaintiff in error recovers costs in both courts.

(259 Fed. 813)

TOLEDO & C. R. CO. v. CINCINNATI, I. & W. R. CO.

(Circuit Court of Appeals, Sixth Circuit. June 30, 1919.)

Nos. 3269, 3270, 3282-3284.

1. EVIDENCE ⟹73—PRESUMPTION—PERFORMANCE OF DUTY.

A corporation which owned all of the stock of another corporation cannot complain of the presumption that it duly performed its duty as to management.

2. RAILROADS ⟹144(1)—CONSOLIDATION—TRUST FUNDS—IDENTITY.

Where a railroad company, which owned all the stock of and operated a second company, received a sum of money on condemnation of terminal of second company, and purchased new terminal facilities, with the understanding that it should take title in its own name. because all of the property of the second company, including after-acquired property, was subject to mortgage, *held*, in view of the understanding between the companies, that the identity as a trust fund of funds derived from condemnation of the second company's terminal facilities was not lost, where the dominant company at all times had in its treasury a fund large enough to cover that one.

3. TRUSTS ⟹84—RESULTING TRUST—CREATION.

Where a railroad company, which owned all the stock of and operated a second company, after receiving damages for condemnation of terminal property of the second company, purchased new terminal facilities, taking title in its own name, as the property of the second company was subject to a mortgage including after-acquired property, and, neither company having sufficient funds to pay outright for the new terminal, property had to be mortgaged, *held* that, under the circumstances, a resulting trust in favor of the second company arose, under Burns' Ann. St. Ind. 1914, §§ 4017, 4019.

4. RAILROADS ⟹144(1)—COLSOLIDATION—MORTGAGE DEBT.

Where two railroad companies, which were dominated by a third, which owned all of their common stock, were consolidated, and the third company received shares of the new company to take the place of those of the two constituent companies, and on the books marked off indebtedness due it from such companies, *held*, in view of the fact that the two constituent companies never earned operating expenses, that the act of the third company was a mere cancellation, and not a payment, of debts which they owed it, so that, on foreclosure of a mortgage on the property of one of the constituent companies and reorganization, the third or dominant company could not be required to pay off mortgage on terminal property bought for such company, title to which was held in trust by the third company, on the theory the cancellation of indebtedness, including amount of mortgage indebtedness, which constituent company, as between the companies, was primarily bound to pay, was a payment.

5. RAILROADS ⟹144(1)—CONSOLIDATION—LIABILITY FOR MORTGAGE DEBT.

Where a dominant railroad company, which controlled another company, purchased terminal facilities for it, to take the place of facilities which had been condemned, and took title in its own name, so that a mortgage on the property could be given, the property of the subsidiary

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company being subject to a mortgage including after-acquired property, *held*, that the subsidiary company was primarily liable for payment of debt, and, on foreclosure of mortgages on the property of both companies, the receivers of the dominant company were entitled to reimbursement for payments it had made on the terminal property in excess of the funds derived from condemnation of property of the subsidiary company.

Appeal from the District Court of the United States for the Western Division of the Southern District of Ohio; Howard C. Hollister, Judge.

In the matter of the receivership of the Cincinnati, Hamilton & Dayton Railway Company, and foreclosure proceedings against the Cincinnati, Indianapolis & Western Railroad Company. From decrees foreclosing mortgages and adjusting equities, the Toledo & Cincinnati Railroad Company appeals, as do Judson Harmon and Rufus B. Smith, as receivers of the Cincinnati, Hamilton & Dayton Railway Company, the company itself, and the Cincinnati, Indianapolis & Western Railroad Company and others. Decrees and orders in part affirmed, and in part reversed, and causes remanded for the purpose of entering a modified decree.

Prior to June 30, 1899, the Cincinnati, Hamilton & Dayton Railway Company (hereafter called the C., H. & D.) owned and operated a railroad from Cincinnati, through Hamilton, to Toledo. The Cincinnati, Hamilton & Indianapolis Railway Company (hereafter called the C., H. & I.) owned the line from Hamilton to Indianapolis, and the Indiana, Decatur & Western (hereafter called the I., D. & W.) owned the line from Indianapolis to Springfield, Ill. The C., H. & D. owned all the stock of the C., H. & I. and the I., D. & W., and was actually operating these roads, either as lessee or as agent for the owners. On August 31, 1902, the C., H. & I. and the I., D. & W. were merged into a new corporation, the Cincinnati, Indianapolis & Western (hereafter called the C., I. & W.). The C., H. & D. likewise owned all the stock of the C., I. & W., and operated that road. The C., H. & I. had been incumbered by a general railroad bond mortgage covering after acquired property, and these mortgage bonds were taken up through a corresponding issue by the C., I. & W. All the C., H. & D. properties were likewise subject to a general mortgage. In October, 1914, foreclosure was pending in the court below of mortgages covering both the C., H. & D. and the C., I. & W. properties. Receivers were appointed, and, as the result of these and other foreclosure proceedings, the two systems were divorced. The C., H. & D. bondholders bought in all the property which belonged to that road, and reorganized as the Toledo & Cincinnati Railroad Company (hereafter called the T. & C.). The bondholders of the C., I. & W. purchased all of its properties and reorganized as the Cincinnati, Indianapolis & Western Railroad Company (hereafter called the new C., I. & W.).

Prior to June 30, 1899, the C., H. & D. had purchased certain terminal property in Indianapolis, which has become known as the "bulking yards." It took the title thereto in its own name, and raised $60,000 of the cost by a mortgage thereon, given to an insurance company, payable $2,000 per year. These yards were for the use of that part of the C., H. & D. business which was being conducted upon the C., H. & I. tracks, and the cost thereof was, on the books of the C., H. & D., charged to the C., H. & I. The legal title has never been conveyed by the C., H. & D., excepting as it has passed by foreclosure to the T. & C. Pending the foreclosure proceedings, a dispute arose between the C., H. & D. interests and the C., I. & W. interests as to the ownership of these yards, and, in the different foreclosure decrees, the question was reserved. November 30, 1915, an agreement was made between the new C., I. & W., on the one side, and the receivers of the C., H. & D., on behalf of themselves and the then about to be organized T. & C., by which agreement the value of the yards was fixed at $96,576, and it was provided that, if it should finally be adjudged that

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the yards belonged to the C., H. & D. interests, they would sell the property to the new C., I. & W., and it would purchase for that sum, less any payments which the court might find had already been made by the C., I. & W. interests.

In settlement of all branches of this controversy, and as supplementary to the foreclosure decrees, the court below found that it had been the duty of the C., H. & D. to convey title to the yards upon payment to it of the cost price thereof; that this cost price had been fully paid; that thereupon the C., H. & D. should have conveyed the unincumbered title; that the title should now be conveyed, but that, since the new C., I. & W. would be compelled to pay that portion of the insurance company mortgage remaining unpaid, the new C., I. & W. was entitled to a money judgment against the C., H. & D. for this amount. From a decree in accordance with these findings, the matter was brought to this court by five appeals and cross-appeals. In No. 3282, the T. & C. appeals, because the property is taken away from it without payment; in No. 3283, the C., H. & D. receivers appeal, because they are not allowed to charge the new C., I. & W., as a condition of the transfer of the title to it, the amount of the serial payments which they made on this purchase-money mortgage out of receivership funds while the property was under their management; in No. 3284, the C., H. & D. complains of the money judgment against it; in No. 3269, the new C., I. & W. complains because it did not have a money judgment against the T. & C., as well as against the C., H. & D., for the amount of these future payments; and, in No. 3270, the new C., I. & W. appeals, because the receivers were not compelled to take up the remainder of the mortgage, and thus convey free of incumbrance. The various appeals involve other complaints also, but enough have been stated to differentiate.

Morison R. Waite, of Cincinnati, Ohio., for appellants and cross-appellees.

Murray Seasongood, of Cincinnati, Ohio, for appellees and cross-appellants.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge (after stating the facts as above). 1. The bottom question is whether there was, originally, any enforceable duty to convey title to the C., H. & I., and, if so, upon what condition? The question may be made concrete by supposing that in 1900 the C., H. & D. and the C., H. & I. interests had been separated, and the C., H. & I. had paid or offered to pay the amount which the C., H. & D. had invested, and thereupon had demanded a deed; would the courts have compelled that conveyance?

[1-3] A more detailed history of the purchase is this: In 1897, the C., H. & D. was operating the C., H. & I. for the account of the latter road. The intention had been that the relations should be those of lessor and lessee; but the formal lease, which had been prepared for that purpose, had been abandoned before 1897. The C., H. & D. charged against the C., H. & I. everything expended in the operation or maintenance of the road, and credited to the same account all the income received. A change in the grade of the city streets seriously impaired the value of the C., H. & I. freight terminal in Indianapolis. Damages on this account were finally assessed at $32,000, and this sum was paid to the C., H. & D. in October, 1897. This money was plainly the property of the C., H. & I., and the voucher therefor was payable to the two roads jointly; but, like ordinary operating income, it was taken by the C., H. & D., mingled with its own funds, and merely

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credited to the C., H. & I. on the general book account. As soon as the injury to this freight terminal, from change in grade, had become imminent, the responsible officers of both railroads began to look about for a substitute. It was found that suitable property in the vicinity could be purchased for an amount first estimated at about $92,000.[1] The C., H. & I. had no funds, except its right to insist that the $32,000 damages be applied to this purpose, and the C., H. & D. had none to spare, with which to complete the purchase. The C., H. & I. was incumbered by a general mortgage which attached to after-acquired property, and it therefore could not raise the money by mortgage on the new yards. Accordingly it was arranged that the property should be purchased in the name of the C., H. & D., and that $60,000 of the purchase price should be procured by mortgage upon the property, securing 30 notes of $2,000 each, to be made by the C., H. & D. and indorsed by the C., H. & I., and due serially, one each year, commencing December 15, 1899. This arrangement was carried out, and the mortgage loan made from an insurance company, and the remainder of the price, which finally turned out to be about $25,000, was paid by the C., H. & D. and charged in its general account against the C., H. & I.

We have said "Accordingly it was arranged," etc., and we think this is the rightful inference from the testimony, although the previous arrangement is chiefly evidenced by what was done. The case is not the usual one where the act of one party might or might not evidence a previous plan between the two. The two railroads had substantially the same boards of directors and general officers, and the same subordinate officers and employés, so far as the C., H. & I. had any of the latter class. The C., H. & I. did whatever the C., H. & D. directed, and did nothing else. Under these circumstances, and in the absence of any tendency to fraud or unfairness practiced by the dominant corporation against the other, and in the absence of any later disclaimer of the rightfulness of the action, the inference is inevitable that the action taken nominally by one corporation in matters affecting the interest of the other was in the execution of their common plan.

The statutes of Indiana, after providing that a trust shall not result merely on account of the payment, when the purchase price is paid by one person and the title taken in the name of another, further provides that this prohibition of resulting trusts shall not extend to cases—

"where it shall be made to appear that, by agreement and without any fraudulent intent, the party to whom the conveyance was made, or in whom the title shall vest, was to hold the land or some interest therein in trust for the party paying the purchase money or some part thereof." Burns' Ann. St. Ind. 1914, §§ 4017, 4019.

We have no hesitation in concluding that such an agreement as this statute mentions was here made between these two railroads, so far

[1] When the matter was closed, the amount expended was about $85,000; but this was the net amount, after returning to the fund about $7,000, the balance of an appropriation for the purchase, which had been put in the hands of the agent who bought the property.

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as concerned the investment of the C., H. & I. money received in exchange for its former terminal. Not only do the circumstances already mentioned point to this conclusion, but it also appears that it was the legal duty of the C., H. & I., under its existing mortgage, to substitute within the lien thereof equivalent property for any which might fall out from under the mortgage, and this duty plainly rested upon the C., H. & D., to the extent of whatever proceeds of such lost property came into its hands. The C., H. & D. cannot complain of the presumption that it performed this duty. There is also the fact that the property was at once listed for taxation as the property of the C., H. & I. and was, with everybody's consent, cut out of the property accounts of the C., H. & D. and put into the construction account of the C., H. & I.

We do not overlook the fact that the C., H. & D., during the years 1898 and 1899, expended considerably more than $32,000 in items which were charged on the C., H. & I. books to its construction account, and which, therefore, should have been permanent improvements. This might or might not be—according to the details, which do not appear in this record—a good answer by the C., H. & D. to a claim that it had wrongfully appropriated this specific $32,000 fund; but it has no persuasive force in determining whether the purchase price of these yards, in excess of $60,000, should be treated as having been made out of the $32,000.

The identity of the fund was not so far lost as to prevent the application of this theory. Here, again, the relations between the parties must be remembered, and the transaction cannot be judged by the same standards applicable to strangers. When the money was received by the C., H. & D., it was not specifically paid out and applied, whereby it later became impossible to apply it to this purpose. There was already a much greater sum due as balance of account from the C., H. & I. to the C., H. & D. Ordinarily the receipt of this money would simply diminish by so much the general balance; but no one claims that the specific fund could rightly be applied for that purpose. There is nothing to indicate that an equal or greater amount did not continually remain in cash in the C., H. & D. treasury, from the time it was received until the final payments were made on account of the new yards, but every reason to suppose the contrary; nor was there anything to prevent an understanding between the parties that the fund should be held by the C., H. & D. until the time came to use it in the intended way. Such an understanding, in connection with the constant presence in the C., H. & D. treasury of a fund large enough to cover this one, would sufficiently preserve the identity of the trust fund, under the standards which this court has approved. Brennan v. Tillinghast, 201 Fed. 609, 614, 120 C. C. A. 37, and cases cited; Southern Co. v. Elliotte, 218 Fed. 567, 571, 134 C. C. A. 295. The testimony is direct and undisputed that the president of the C., H. & D., who in fact dictated the policy of each, approved the early suggestion of a subordinate officer that this particular fund, when realized, should be devoted to this particular purpose.

Nor was there such long delay in using the money as would con-

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vince that its identity was lost. The money was received in October, 1897. In July, 1898, about $3,000 was paid for some rights or lands in connection with the new yards, and charged to "C., H. & I. Real Estate," and apparently at about the same time the sum of about $29,000 was put in the hands of a representative of the company for the purpose of buying these yards. Thereafter the general manager of the C., H. & D. returned to the treasury about $7,000, entered on the books as "being balance left in his hands from a trust fund for the purchase of terminal property." These amounts, including the refund, do not precisely equal the $32,000; they overrun it about $1,000, but the coincidence is sufficient, taken in connection with all the facts, to justify the finding that both railroads intended to and did make this purchase of the new yards, to the amount of the excess over $60,000, with the money received from the old station, and that the title so paid for should be held in trust.

[4] It follows that, at the conclusion of this purchase, the C., H. & D. held the legal title in trust for the C., H. & I., but the title was subject to the insurance company mortgage; and it remains to consider the rights and equities of the parties with regard to this incumbrance. In form, this was the debt of the C., H. & D., and the C., H. & I. was only guarantor; but the total amount of the obligation was at once, at the close of the fiscal year, charged on the C., H. & D. books to the C., H. & I., and on the C., H. & I. books was credited to the C., H. & D. It therefore plainly became, as between the parties, the primary obligation of the C., H. & I.; and this relationship continued, without doubt, until August 31, 1902. In the meantime the C., H. & D. paid $6,000 of the principal of the mortgage. Since it had once charged the entire principal to the C., H. & I., as it paid these items they were not charged again; but the interest which accrued on the mortgage and was paid by the C., H. & D. during this interval was charged against the C., H. & I., thus confirming the theory that the duty of payment rested upon the latter road.

On August 31, 1902, there was a consolidation of the I., D. & W. and the C., H. & I. into the C., I. & W., and it is claimed that, at this time, the C., H. & I. paid to the C., H. & D. the $56,000 which then remained unpaid out of the $60,000 mortgage. If this was true, the primary duty, as between the parties, of paying the remainder of the mortgage, was then transferred to, and rested upon, the C., H. & D.; and the court below adopted this theory of payment and the resulting rights. What was the fact as to such payment? Nobody claims that the C., H. & D. got any money at this time. There had been, every year, a deficit in the C., H. & I. operations, and, at this date, the balance which was against the C., H. & I., as a debt to the C., H. & D. was $531,000. This general balance included the $85,000 which had been charged as the price of this property, and thus, in a very fair sense, included the $54,000 which the C., H. & D. had not, as yet, paid upon the insurance company mortgage. The whole plan of merging the C., H. & I. and the I., D. & W. into the C., I. & W. was covered by the reorganization contract to which the C., H. & D. was a party. This contract provided that the C., H. & D., in exchange for its stock (all the

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stock) and bonds in the two old companies, should receive stock and bonds in the new company upon a specified basis of exchange. When the transaction was carried out, the $531,000 indebtedness against the C., H. & I. and the similar debt of about $693,000 in favor of the C., H. & D. against the I., D. & W., were canceled. About such cancellation and disappearance of the indebtedness there is no question; but whether the debts were paid is quite another matter.

The evidence of payment is said to be found in the entries made upon the books of the three respective companies; and we have given these entries careful observation. No help is to be had from the entries upon the C., H. & I. books. These books are closed by an entry which is nothing but a summarized trial balance. All the liabilities are set on one side and the assets on the other, and they exactly balance. From this it is to be assumed that the profit and loss account, which was one of the chief assets, was adjusted in order to make this balance. The $531,000 debt appears in this entry as one of the liabilities, but there is nothing suggesting that it was paid, or even eliminated by a profit and loss entry; on the contrary, it was, so far as these books go, allowed to stand as a liability. The books of the C., I. & W. are no more pertinent. The opening entry of the consolidated road shows merely that its capital stock and bonds were issued in exchange for or as against the capital stock and bonds of the old railroads which were united. It gives no information as to this $531,000 debt, but, by its silence, indicates that the new road did not assume or pay this debt. The original entry on the C., H. & D. books is the only one giving color to the claim of payment. This shows only that it had carried among its assets the stock of the two old roads, open accounts against each ($531,000 against the C., H. & I. and $693,000 against the I., D. & W.), and an account which (apparently) represented its loss on bonds sold ($113,000), all carried at the aggregate value of $2,833,000, and that it charged these assets off in exchange for $7,097,000 (par value) of common stock in the C., I. & W. The question, therefore, is whether it should be considered in a court of equity that the C., H. & D., through receiving the common stock in the consolidated company, actually received money or money's worth for the $531,000, so that the subsequent rights of the parties would be the same as if it had been paid over in money, or whether this item was merely charged off and canceled without receiving anything substantial in exchange for it.

Several considerations, as we think, compel the conclusion that there was no real payment, as distinguished from mere cancellation. The first is that there clearly was not, in the mind of any one, any value whatever in this account against a railroad which could not make operating expenses, and the cancellation of the account could not have been intended to be exchanged for anything of substantial value. The second is that the new common stock being received—at least as to any surplus above the value of the old stock surrendered—was apparently as worthless as the account was. The third is that the reorganization agreement provided that the C., H. & D. should have, in exchange for the surrender of its stock in the old companies, precisely the total amount of stock in the consolidated company which it did receive, and

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we therefore find a careful declaration by both parties that the new stock was fully paid for by the surrender of the old stock, leaving none of it to apply in exchange for the debt. Clearly, the new consolidated stock, received by the C., H. & D., had an actual value, by representing tangible assets, no greater than the stock of the constituent companies which it surrendered in exchange. The railroad properties of the new company and of the old companies were identical; the mortgage indebtedness was somewhat increased; the financial condition was better only by reason of the disappearance of the $1,337,000 of the floating debt of the old companies; and this had disappeared only because the C., H. & D., the sole stockholder, had charged it off. To say that one who holds all the stock in a corporation, and also holds a debt against it, gets his debt paid by canceling it, and to say this because his stock thereby may become salable for a larger price, is to state an obvious fallacy. To the extent by which the selling price actually received, or the market selling price, is thereby increased, it would be true, but no further.

Some further reasons urged that the debt should be treated as if actually paid we think untenable. One is that the C., H. & D. had the power, under the agreement, to issue the remainder of the common stock of the C., I. & W. for the extinguishment of that road's floating debt; but this never was done. The very fact that the C., H. & D. did not, pursuant to this power, take stock in direct exchange for the $531,000, tends to show that all parties regarded the transaction as the cancellation, and not as the payment, of the debt. Another reason is that the C., H. & D. agreed to sell the bonds of the C., I. & W., and to use the surplus, which remained after retiring the bonds of the old roads, in retiring the floating debts of those roads. But there never was any surplus; instead, there was a shortage; and, anyway, this debt was "retired."

[5] However, it is not necessary to stand on the position that no part of the $531,000 was really paid; we are concerned only with the $54,000, which has an aspect all its own. Whether the $60,000, of which this was the remainder, should be charged to the C., H. & I., when the C., H. & D. first gave its notes for the loan, or should be charged from time to time as the serial payments were actually made, was a mere matter of bookkeeping. To create a debt to the C., H. & D. from the C., H. & I. therefor was not rightful, except upon the theory and the contingency that the notes would be paid by the C., H. & D. There was no fixed and certain equitable obligation, until payment was made. Under what we have found the true theory of the rights of the parties, it was then, as between themselves, the duty of the C., H. & I. to pay this $54,000 to the insurance company. If this theory had been in the minds of the parties, and it had been understood that the yards belonged to the C., H. & I. or the C., I. & W., subject to this mortgage, it would have been a strange thing for the C., H. & D. to shift this obligation to itself. To cancel an uncollectible debt to help out a reorganization is one thing; to agree that the debt shall be thereafter increased by a large amount is quite different. We think that an intent by the C., H. & D. to continue primarily liable for this $54,000

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mortgage upon property which it did not own would be so unnatural that it could not be inferred, except from the plainest evidence. To say the least, the tendency of the evidence is the other way. We therefore cannot find in this transaction any such real and substantial payment of this sum to the C., H. & D. as put upon it the duty of paying the mortgage.

Without much doubt, the actual thought of the C., H. & D. officers was to the contrary effect. They expected to pay this mortgage themselves; but this was because they thought they owned the property. We are now dealing with the duties which the law will put upon them after it is determined that they did not own the property; and, so far as we are concerned with their intent, it is with that intent which shall be imputed to them after they are put upon the right basis.

From 1902 to 1913, the C., H. & D. paid the principal sum of $2,000 per year, and also paid the accruing interest. The principal payments it treated as made on its own property; the interest payments, apparently, were treated with reference to the value of the use of the property. If nothing else were involved, the C., H. & D. would be entitled to recover these payments, because they were made under a mistake of fact, and they inured to the benefit of the C., I. & W.; but the record does not permit such recovery. The accounts and liabilities of the parties back and forth up to the time of the receivership necessarily involve innumerable questions not covered by this record. To open this one subject would necessitate opening many others; and, as to all these transactions, as well as to the improvements which the C., H. & D. put upon the property from the time, in excess of the unexpended balance of the $32,000, the parties must be left where they have left themselves.

The situation changes, when the C., H. & D. receivers were appointed. They took possession of the assets in aid of a foreclosure; they had no right to use receivership assets of the C., H. & D. to pay the obligations of the C., I. & W. Under the same mistake of fact as to the ownership of these yards, the receivers paid the annual mortgage installments of $2,000 each for 1914, 1915, and 1916, and also paid $4,455 mortgage interest accruing during the same period. These payments were for the benefit of the C., I. & W., most of them were made after this controversy had arisen, and they should be refunded to the receivers. The facts do not justify the collection of interest upon these payments.

The substantial and net result of our conclusions is that, at the date when the receivers were appointed, the C., I. & W. was entitled to a conveyance of the yards, subject only to the payment by it of the principal and interest payments thereafter accruing upon the mortgage; that it and its successor must, as a condition of receiving now the transfer of title, assume the obligation to make all future payments, and must carry the burden of those payments which it has made, and refund those payments which, since that date, have been made by others. Hence it is evident that the new C., I. & W. is not entitled to any decree for the amount of the mortgage payments which it has made or may hereafter make, nor to any conveyance from the C., H.

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& D., the receivers, or the T. & C., except conveyance of the same title which the C., H. & D. had originally received, free from any incumbrance or liens since placed thereon by the holder of the legal title, but subject to the unpaid principal and interest of the mortgage. The contract of November 30, 1915, contemplates a warranty deed only in case it is found that the C., H. & D. owned the yards.

Accordingly, the decrees and orders of the court below as involved in appeals Nos. 3269 and 3270 will be affirmed, and as involved in Nos. 3282, 3283, and 3284 will be reversed, and the cases will be remanded, for the purpose of entering a modified decree in accordance with this opinion. The costs in this court, of all the appeals, will be grouped, and, of the total, the new C., I. & W. will pay one-half, and the receivers will pay one-half.

(259 Fed. 822)

BELFI et al. v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. June 18, 1919.)

No. 2411.

1. MONOPOLIES ⚷12(2)—ANTI-TRUST ACT—COMBINATION IN RESTRAINT OF INTERSTATE COMMERCE.

A combination between members of a tile dealers' association to exclude trade competitors from membership and to make it impossible for them to obtain tiles or tile setters by refusing to buy tiles from manufacturers, most of whom are located in other states, who sold to such competitors, and by an agreement with the tile settlers' union that the latter would not allow its members to work for nonmembers of the association, *held* to directly affect interstate commerce, in violation of Sherman Anti-Trust Act, § 1 (Comp. St. § 8820).

2. CRIMINAL LAW ⚷910—EFFECT OF GRANTING NEW TRIAL TO CERTAIN DEFENDANTS.

Where several persons, tried together, have been convicted of a conspiracy, the granting of a new trial to certain of the defendants, against whom there was no evidence, and who were not shown to have said or done anything which could be prejudicial to their codefendants, does not confer upon the others the right to a new trial.

In Error to the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge

Criminal prosecution by the United States against A. P. Belfi, Constantine Belfi, Angelo Trevisan, and seven others. Judgment of conviction, and defendants bring error. Reversed as to defendants Trevisan and Constantine Belfi, and affirmed as to the other defendants.

Edward J. Mingey, Frank M. Cody, and Harry M. McCaughey, all of Philadelphia, Pa., for plaintiffs in error.

G. Carroll Todd and Ernest Harvey, Asst. U. S. Attys., and Henry S. Mitchell, Sp. Asst. Atty. Gen., for the United States.

Before BUFFINGTON, WOOLLEY, and HAIGHT, Circuit Judges.

WOOLLEY, Circuit Judge. The defendants were convicted in the court below under an indictment preferred against them at the in-

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stance of the United States for engaging in a conspiracy to restrain interstate trade and commerce, in violation of the act of Congress, entitled, "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890 (26 Stat. 209, c. 647 [Comp. St. § 8820]). After sentence, the defendants sued out this writ of error and now raise several questions for review, the principal one being, whether the evidence sustains the conviction, and whether, accordingly, the trial court erred in denying a motion to direct a verdict of acquittal. The determination of this question involves another, which concerns the conduct of the defendants in combining as members of a trade association to refrain from business dealings with others who deal with non-member competitors, raising the issue, whether the restraint of interstate trade and commerce resulting therefrom, if any, was so indirect and remote as not to be within the offence of the statute.

[1] The industry out of which this controversy arose is the tile industry. In it are engaged three classes of persons, tile manufacturers, tile dealers, and tile setters. The part taken by each class is fairly indicated by its name. The business of tile dealers, as conducted in Philadelphia, is of a character that does not require them to keep tiles in stock. It consists chiefly in making bids on proposals, and, when their bids have been accepted and contracts have been entered into, tiles of the kinds specified are then procured from tile manufacturers and are put in place by tile setters employed by the tile dealers.

The defendants, who are tile dealers engaged in the retail tile business in Philadelphia and vicinity, had joined together and associated themselves in a trade organization known as the Philadelphia Tile, Mantel & Grate Association, ostensibly for the correction of trade abuses and evil practices and the promotion of sound business policies. This association, though admittedly a trade combination, was not regarded by the trial court to be in and of itself a combination violative of the federal statute against unlawful restraints and monopolies. The controversy, therefore, concerns not the unlawfulness of the combination but the unlawfulness of the conduct of some of its members in carrying out its conceivably lawful purposes. This conduct consisted, as it is alleged by the indictment, in excluding trade competitors from membership in the association, in the refusal of association dealers to buy tiles from manufacturers that sold tiles to non-member dealers, and in entering into agreements with a tile setters' labor union, whereby association dealers obtained from the union, first, a preference over non-member dealers in the employment of union tile setters, and, second, a promise by the union to supply no tile setters to tile dealers outside of the association, thereby creating a boycott of non-member tile dealers by making it impossible for them to get materials for their business and labor with which to carry it on.

Turning to the evidence, we find that a written contract was formally entered into between the association and the union covering hours of labor, wage scale, and other matters not pertinent to this issue. It included also provisions whereby members of the association

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agreed that they would employ none but members of the labor union, and the union in return agreed that it would give preference to requests made by association dealers for tile setters over similar requests made by non-member dealers. That these provisions were contained in the agreement and were carried out by the parties is conceded. The defendants maintain, however, that this agreement and its literal performance constitute the whole of their conduct, and as this conduct affected interstate commerce only remotely, if at all, the trial court should have acquitted them of the charge of offending against the statute.

If this were all the testimony, we would have little difficulty in concurring in this view, for, manifestly, restraint of interstate commerce resulting from such an agreement would not be of that direct character which the courts have interpreted to be within the meaning of the statute. But there is other testimony, which, if believed, gives the case a different aspect.

It is admitted by the defendants that the association endeavored to write into the contract between itself and the union a reciprocal provision whereby the union would agree not to allow its members to work for dealers outside the association in consideration of the undertaking of the association not to employ setters outside the union. To this provision, it is conceded, the union did not agree —in writing. But it is in evidence (though denied by the defendants) that the association and the union entered into an oral contract to this effect at the same time they entered into the written contract. In operating under the two contracts, there is evidence quite sufficient for a jury to find that the association, representing about 90 per cent. of the tile dealers, and the union, comprising nearly all the tile setters in Philadelphia and vicinity—the latter being described as "close to 100 per cent. organization"—so cooperated that non-member dealers could not employ tile setters. Being blocked in obtaining labor, there is evidence that non-member dealers were as effectually blocked in obtaining materials for their business because of the endeavor by some association members to induce union setters, through the union, to refuse to set tiles sold by manufacturers to non-member dealers, and because of the refusal of tile manufacturers to sell tiles to non-member dealers under the threat of association dealers that they would not buy tile from them if they sold to dealers outside the association. As all tile manufacturies in the country, save one, are located in states other than the state of Pennsylvania, an interference with commerce caused by the refusal of tile setters to set tile and of tile manufacturers to sell tile is necessarily interstate in character. The jury having found that the defendants had by their acts restrained commerce, and that restraint being of commerce that was interstate in character, the only question for us to decide is, whether the restraint to interstate commerce thus occasioned by the defendants, was so indirect and remote that the trial judge should have declared as a matter of law that it was not such restraint as is contemplated by the statute.

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The determination of this question turns on familiar principles repeatedly declared by the courts and stated nowhere more clearly perhaps than by the Supreme Court in Hopkins v. United States, 171 U. S. 578, 19 Sup. Ct. 40, 43 L. Ed. 290, and Anderson v. United States, 171 U. S. 604, 19 Sup. Ct. 50, 43 L. Ed. 300. These cases are cited by the defendants as presenting facts analogous to the facts of this case, and are confidently relied upon as ruling this case on the law.

Hopkins v. United States and Anderson v. United States were companion cases arising out of the manner in which business was conducted in the stock yards at Kansas City. The business of the stock yards was transacted by members of two exchanges and also by persons who were members of neither exchange. The Kansas City Live Stock Exchange (under consideration in the Hopkins Case) was an association of commission merchants. The rules of this association forbade members buying live stock from commission merchants of Kansas City not members of the exchange, and forbade members transacting business with any person violating its rules and regulations. The Traders' Live Stock Exchange (under consideration in the Anderson Case) was, as its name denotes, an association of yard traders, men who speculated in live stock. The articles of association of the Traders' Live Stock Exchange forbade its members recognizing any yard trader unless he was a member of the exchange, and forbade any member of the exchange purchasing cattle from a commission merchant who sold or purchased cattle from any yard trader who was not a member of the exchange. The main difference between the two exchanges was that the members of the Traders' Live Stock Exchange being traders, were themselves purchasers of cattle on the market, while the members of the Kansas City Live Stock Exchange were commission merchants who received cattle by consignment and sold them on commission. The purposes of the two exchanges being kindred, the Government charged that the association of commission merchants in one case and of yard traders in the other were combinations in restraint of interstate trade violative of the statute.

In each of these cases, the Supreme Court very carefully pointed out that there was no evidence of any act on the part of the defendants preventing access to the yards or preventing purchases and sales of cattle by anyone, other than as such sales were prevented by the mere refusal on the part of the defendants to do business with non-members in a manner violative of the rules of their respective exchanges, and that there was no evidence that the defendants had in any manner "other than by the rules mentioned hindred or impeded others in shipping, trading or selling their stock, or that they had in any way interfered with the freedom of access to the stock yards of any and all other traders and purchasers, or hindered their obtaining the same facilities which were therein offered by the stock yards company to the defendants as members of the exchange." After acquitting the defendants of all acts violative of the statute, save their membership in the exchanges, the court proceeded to consider and pass upon the articles of association by which the members of the

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two exchanges were bound as contracts creating combinations or monopolies in violation of the statute. This was the single issue.

The law of these cases, having to do only with the lawfulness of the articles of association of the two exchanges, would, we surmise, bear directly on the case at bar, if, as the defendants here maintain, it involved nothing more than the articles of association and the written contract between the association and labor union. But the case at bar differs substantially from the cases cited, in that it contains evidence of acts on the part of some of the defendants, aside from subscribing the articles of association and complying with the written labor contract, which prevented access to the tile trade of Philadelphia and vicinity by tile manufacturers of distant states, and prevented purchases of their tiles by non-member tile dealers in Philadelphia, because of the penalty imposed upon tile manufacturers in distant states for selling to non-member dealers and of the impossibility of non-member dealers getting their tiles laid by local union tile setters. If there had been in the Hopkins and Anderson Cases acts of the defendants analogous to these, whereby, for instance, the members of the two exchanges had so acted as to prevent cattle men in distant states from shipping cattle to Kansas City and selling them there, or had contracted with stock yard union laborers not to handle cattle consigned by non-resident cattle men to non-member commission merchants, or not to handle cattle sold by non-resident cattle men to non-member traders, then, we apprehend the Supreme Court might have regarded these cases differently and might have found that the direct, immediate and inevitable effect of such acts was to restrain commerce in cattle between the states. It is not necessary to repeat or review in this opinion the elaborate discussion of the law on the subject pursued by the Supreme Court in the opinion in the two cases cited. It is sufficient to say that we believe the acts charged against the defendants named in the judgment now under review—over and beyond the articles of association by which they were bound and the written contract with the labor union into which their association had entered—were such, if committed, as did have a direct and immediate effect upon interstate commerce in tiles, resulting in its unlawful restraint.

If, however, the Hopkins and Anderson Cases raise a valid doubt on this point, that doubt is assuredly set at rest by the later decisions in Montague & Co. v. Lowry, 193 U. S. 38, 24 Sup. Ct. 307, 48 L. Ed. 608, and Eastern States Lumber Association v. United States, 234 U. S. 600, 34 Sup. Ct. 951, 58 L. Ed. 1490, L. R. A. 1915A, 788, in which the Hopkins and Anderson Cases are distinguished.

In the Eastern States Lumber Association Case, the Supreme Court, in quoting from Gompers v. Buck Stove & Range Co., 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874, stated the law which we regard as applicable to this case. It is as follows:

"It [the Sherman Act] covered any illegal means by which interstate commerce is restrained, whether by unlawful combinations of capital, or unlawful combinations of labor; and we think also whether the restraint be occasioned by unlawful contracts, trusts, pooling arrangements, blacklists, boy-

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cotts, coercion, threats, intimidation, and whether these be made effective, in whole or in part, by acts, words, or printed matter."

In quoting this law from the opinion in Gompers v. Buck Stove & Range Co., the Supreme Court evidently regarded it as apposite to the case of Montague & Co. v. Lowry, for it cited that case in conjunction with the quotation. The Lowry Case on the facts is singularly like the case at bar. In the Lowry Case, the Tile, Mantel & Grate Association of California differed from the Philadelphia Tile, Mantel & Grate Association in the instant case chiefly in the fact that in the former case both resident tile dealers and non-resident tile manufacturers were members of the association, the tile manufacturers being bound by its articles not to sell tile to non-member dealers on penalty of forfeiting their membership and with it their trade; while in this case, non-resident tile manufacturers were not members of the association, yet were induced, under threats from members of the association, to refuse to sell tiles to non-member dealers. Non-resident tile manufacturers were thus prevented or hindered, either by membership agreement with tile dealers in one instance or by threats made by tile dealers in the other, from selling tiles to any dealers outside the association. The effect on interstate commerce was precisely the same in both instances.

Reviewing the evidence in this case in the light of the law declared by the decisions of the Supreme Court, we cannot find that the trial judge committed error in submitting the case to the jury.

Judgment was entered on verdict against all defendants, twenty-one in number. In the theory or in the strategy of their defense at the trial, the defendants did not make separate defenses, but joined in a manner that indicated their willingness to stand or fall together. In consequence, the trial judge in his charge treated the defendants generally, not individually. After conviction, all joined in a motion for a new trial, and at the argument, each defendant urged his separate ground, which, in some instances, was just such a defense as he separately could have made at the trial. As it was not charged that the association was in and of itself an unlawful combination, the trial judge found on the motion for a new trial that there was only slight evidence beyond that of membership in the association against eleven of the defendants. To these defendants he granted a new trial, and entered judgment on the verdict against the remaining ten. From this action of the trial judge in granting the motion for a new trial as to some defendants and denying it as to others, the defendants, whose motion was refused and who are in this court on writ of error, raised two questions at the argument outside the assignments of error.

The first question has to do with the correctness of the judge's selection of defendants to be awarded a new trial on the ground of insufficient evidence to sustain the verdict as to them. Certain of the plaintiffs in error contend that with respect to them also there was a like lack of evidence. As the action of the trial judge in granting the motion with respect to some of the defendants was not opposed by the Government—indeed, the Government assisted the judge

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in separating the defendants—we feel that we should follow the principle on which he acted by inquiring into the evidence and discovering whether there were others against whom there was the same lack of evidence as against those granted a new trial, being particular, however, to avoid even the appearance of recognizing a right in an aggrieved party to assign as error the ruling of a trial judge on a motion for a new trial. As we cannot very well decline to do what the trial judge did in separating the defendants against whom there was not sufficient evidence to sustain the conviction from those against whom there was sufficient evidence, we have of our own motion given this aspect of the case careful consideration and are of opinion that Angelo Trevisan and Constantine Belfi should have been included in the group awarded a new trial.

[2] The other question arising out of the action of the trial judge on the motion for a new trial was not presented to him and was raised for the first time at the argument on this writ of error, without an assignment of error. It is: Whether the judgment should be reversed against the defendants embraced in it, on the ground that, where several persons have been convicted of a conspiracy, a new trial cannot be granted to some of the conspirators without granting it to all.

It should be noted on the threshold of this discussion that this contention was not addressed to the trial judge and that no exception was taken to his action in granting a new trial to some of the defendants. If the action of the trial judge were error, he should have been apprised of his error when he committed it and he should have been afforded an opportunity to correct it by an appropriate exception seasonably made. United States v. United States Fidelity Co., 236 U. S. 512, 529, 35 Sup. Ct. 298, 59 L. Ed. 696; Guerini Stone Co. v. Carlin Construction Co., 248 U. S. 334, 348, 39 Sup. Ct. 102, 63 L. Ed. 275; Fillippon v. Albion Vein Slate Co., 250 U. S. 76, 39 Sup. Ct. 435, 63 L. Ed. 853. Counsel for the defendants did not do this for several conceivable reasons. They might not have noticed the alleged error; or noticing it, they might not have cared to take the risk of the trial judge refusing the motion as to all defendants, which the trial judge might properly have done in view of the position which the defendants took at the trial of standing or falling together; or they might not have desired to lose the advantage of the clearly indicated inclination of the judge to resolve doubts as to the evidence in favor of certain of the defendants when its insufficiency was debatable. Ordinarily we would require the parties to abide the consequences of their manœuvre, but as this is a criminal case, with all the implications and consequences of cases of that class, we have of our own motion given this question consideration and shall dispose of it as though it were properly before us.

Counsel for the defendants who were denied a new trial rely on Commonwealth v. McGowan, 2 Parsons' Selected Equity Cases, 341, to sustain their position. We have not had access to the volume in which this case is reported, but, from the part of the opinion which counsel have quoted at length, it is quite clear that the rule applied in that case is not applicable to this case. The basis of that decision seems

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to be, that when a conspiracy has been proven, what one of the conspirators said or did is regarded as evidence against the others, and that, as the court cannot know the bearing which the evidence of words and acts of one might have had in procuring the conviction of the others, a new trial, if granted, should be granted to all. But when, as in this case, there is no evidence at all to connect some of the defendants with the conspiracy and there is evidence to connect others, and when, as in this case, there is no evidence that those who were granted a new trial said or did a single thing that could implicate those who were not granted a new trial, it is not reasonable to assume that the lack of evidence to convict those granted a new trial could in some conceivable way have contributed to the conviction of the others. The only evidence introduced to connect those who were granted a new trial with the conspiracy was their membership in the association and their presence at the meetings. As they spoke no words and did no acts to implicate themselves, manifestly, they could not have implicated the others. The question which confronted the trial judge on the application for a new trial was, whether there was evidence which would sustain the conviction against all. As to certain named defendants he found the evidence insufficient. While the same evidence showed that the remaining defendants were similarly members of the association and present at its meetings, there was additional and cogent evidence that they were actors in the conspiracy and were the ones who had violated the statute. If the situation had been reversed, and a new trial had been granted those who were refused a new trial and a new trial had been denied those who were granted a new trial, then, there would perhaps be merit in the defendant's contention, for then it could be said that the evidence of the sayings and doings of the actors thus granted a new trial may have been the very evidence on which those who were denied a new trial were convicted.

The rule of law on which counsel for the defendants rely, namely, that, "where two or more persons have been convicted of a conspiracy, it is not possible to grant a new trial as to one and not as to the others," for which they find support in the opinion of the cited case, cannot be the general rule applicable to all cases without regard to their circumstances. In fact, such a rule, general and applicable to all cases, is not supported by authority. In United States v. Cohn, 128 Fed. 615 (C. C. S. D. N. Y.), one Cohn and one Brown—there having been a severance as to Rosenthal, the other alleged conspirator—were convicted of a conspiracy to defraud the United States in respect to import duties. Each defendant moved for a new trial. The motion was allowed Cohn and denied Brown. In disposing of the motion Judge Thomas (128 Fed. 626) said:

"Upon the authority of Regina v. Gompertz, 6 Pa. Law J. 377, Commonwealth v. McGowan, 2 Par. Equity Cas. 341, and Dutcher v. State, 16 Neb. 30, 19 N. W. 612, it is urged by counsel for Brown that a new trial for Cohn must result in a new trial for Brown. These cases do not seem in point. Cohn is granted a new trial because no cause of action was proved against him, and the indictment should have been dismissed as to him by the court. Had such

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dismissal been ordered, nevertheless Brown's case could have been submitted to the jury."

This ruling was expressly affirmed by the Circuit Court of Appeals for the Second Circuit (Browne v. United States, 145 Fed. 1, 76 C. C. A. 31); Judge Lacombe saying (145 Fed. 13, 76 C. C. A. 43):

"There was no error in refusing a new trial to Brown, and at the same time granting one to Cohn. The evidence certainly showed that more than one person participated in the corrupt understanding; that some one, who had power and authority to manipulate the invoices of A. S. Rosenthal & Co. and fill them with false statements, had conspired with the individual who was to pass upon those invoices. It might have been Cohn, or Rosenthal, or both, or one of them with the guilty assistance of others, and we fail to see how the finding of the court that the evidence was not sufficient to identify Cohn as the guilty party changes the situation. The evidence certainly warranted a verdict that Brown conspired with one or more persons, unnamed or unknown, who were to prepare false invoices, to defraud the United States."

A certiorari in that case was denied by the Supreme Court (200 U. S. 618, 26 Sup. Ct. 755, 50 L. Ed. 623). We can see no distinction between the case at bar and the Cohn Case.

Our conclusion, therefore, is, both on reason and authority, that the granting of a new trial to certain of the defendants in this case does not confer upon the others a right to a new trial.

We direct that the judgment below be affirmed with costs as to all defendants except Angelo Trevisan and Constantine Belfi, and as to them the judgment be reversed with their costs and a new trial granted.

(259 Fed. 830)

NATIONAL TRUST & CREDIT CO. v. F. H. ORCUTT & SON CO. et al.

(Circuit Court of Appeals, Seventh Circuit. April 2, 1919. Rehearing Denied May 15, 1919.)

No. 2662.

1. SALES ⟹6—CONSTRUCTION—CONTRACT FOR LOANS OR SALES OF ACCOUNTS.
   A contract under which a mercantile company assigned accounts against its customers, which it guaranteed to the other party, which advanced a stated per cent. of their face value, collected the same, and, after deducting the advance, expenses, and an agreed charge, returned the balance to the company under the law of Illinois and of the federal courts, is a loan contract, and not one for the sale and purchase of the accounts.
2. CORPORATIONS ⟹487(1)—CONTRACTS ULTRA VIRES.
   A contract by defendant corporation to lend money to complainant, which defendant was without charter power to make, is void, and neither party can enforce it or predicate upon it any right of recovery.
3. ACCOUNT ⟹1—GROUNDS FOR ACCOUNTING—TRANSACTIONS UNDER VOID CONTRACT.
   An accounting may be had based upon a series of transactions between the parties, although they took place under a contract which was void for want of power in one party to make it.
4. USURY ⟹102(1)—RECOVERY OF USURY PAID—EFFECT OF SETTLEMENT.
   Under the law of Illinois, as by the general law, transactions tainted with usury, but which have been definitely settled and closed as between

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the parties, cannot thereafter be made the subject of recovery or accounting respecting the usurious interest paid.

5. ACCOUNT ⟹1—ACCOUNTING—SEPARATE TRANSACTIONS.

Where complainant from time to time assigned accounts receivable to defendant pursuant to a contract void for want of power in defendant to enter into it, but under which complainant received an advance on the accounts received at any one time, and on their collection received back the balance above the advance less certain charges, each of such transactions was separate, and when so closed was settled independently of the others, and not subject to a future accounting.

Evan A. Evans, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit by the F. H. Orcutt & Son Company, and David D. Miller and William A. Maurer, as trustees for the creditors of the F. H. Orcutt & Son Company, against the National Trust & Credit Company. Decree for complainants, and defendant appeals. Reversed.

John W. Creekmur and Donald J. De Wolfe, both of Chicago, Ill., for appellant.

William S. Oppenheim, of Chicago, Ill., for appellees.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

ALSCHULER, Circuit Judge. [1] Appellant, a business corporation organized under the general incorporation laws of Illinois, for the purpose inter alia of purchasing accounts receivable, made a written agreement at Chicago, May 26, 1910, with appellee F. H. Orcutt & Son Company (referred to herein as the Company), a Nebraska wholesale merchandising corporation, the general purport of which is that thereafter the Company might sell and duly assign to appellant such of the Company's customers' current accounts as it desired so to dispose of, and that appellant should upon such of the accounts as it approved at once pay the Company about 80 per cent. of the face thereof; that the Company as agent for appellant should receive from the customers the remittances for the accounts, and as received send them to appellant, which was given power of attorney to indorse them; whereupon appellant should deduct therefrom its first advance, its own charges, and whatever if any expense it had incurred, and remit the rest to the Company as payment of the balance of purchase price of such accounts. The Company guaranteed the payment of all the accounts, and agreed to pay appellant within five days after notice of default the face value of defaulted accounts.

Upon the execution of the contract dealings between the parties, substantially on the plan outlined in the contract, commenced, and actively continued for over two years, covering hundreds of separate accounts aggregating in face value nearly half a million dollars. In 1912 the Company became deeply involved, and the number of accounts grew less, and in September appellant terminated the Company's agency to collect assigned accounts and itself proceeded to collect them. In December the Company, with the consent of all the

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creditors (except appellant), made a general assignment for the benefit of its creditors, and there then remained unpaid of previously assigned accounts somewhat over $75,000, which appellant was undertaking itself to collect. Where remittances came to the trustees they sent them to appellant.

The amounts which appellant retained ostensibly as the profits in the transactions exceeded the maximum which under the interest laws of Illinois may be taken as interest on loans. The bill herein, filed May 13, 1914, by the Company and its trustees, is predicated on the claim that these transactions between the parties, while purporting to be sales of accounts, were in fact loans from appellant to the Company; that the interest on such loans which appellant really contracted to receive, and did receive, was usurious; and that appellant should be required to account for all such usurious payments of interest beyond the Illinois noncontract rate of 5 per cent. per annum. An amendment to the bill set up the additional claim that appellant had no charter power to make loans, and that as a loaning agreement the contract was unlawful and void, but did not affect the relief demanded in the bill.

Upon this basis accounting was ordered, resulting in a decree against appellant for $17,353.38, after allowing it various items for service and expense in the collection of certain of the later assigned accounts.

Appellant contends that the contract was one of sale and not of loan, wherefore the transactions were within appellant's charter powers, and were not subject to the complaint of usury; and that in any event many, or most, of the transactions were, as between the parties thereto, settled and closed, and were not properly subject to be reopened for inclusion in the accounting.

The contract here is in all essentials like those which the federal and the Illinois courts have held to be in fact loaning contracts, and not contracts for sale of accounts as on the face they purport to be, and the transactions under them to be loans and not sales. Mercantile Trust Co. v. Kastor, 273 Ill. 332, 112 N. E. 988; Dorothy v. Commonwealth Co., 278 Ill. 629, 116 N. E. 143; Home Bond Co. v. McChesney, Trustee, 239 U. S. 568, 36 Sup. Ct. 170, 60 L. Ed. 444; In re Grand Union Co., 219 Fed. 353, 135 C. C. A. 237. The contract in question must therefore be regarded as if loans, and not sales, were its subject-matter. But, appellant being organized under the general incorporation act of the state of Illinois, it concededly follows that it had no power under its charter to engage in the loaning business, and that its loaning transactions are, as such, ultra vires and void. Mercantile Trust Co. v. Kastor, supra; Calumet, etc., Dock Co. v. Conklin, 273 Ill. 318, 112 N. E. 982, L. R. A. 1917B, 814; North Avenue Building & Loan Association v. Huber, 270 Ill. 75, 110 N. E. 312, Ann. Cas. 1917B, 587; Central Transp. Co. v. Pullman's Car Co., 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55.

[2] Holding, as we do, that the real transaction between these parties was intended to be, and was in fact, for loans of money and not sales of accounts, and that appellant had not the legal capacity to enter into such transactions, the contract had no validity whatever,

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and neither party could enforce it, nor predicate upon it any right of recovery.

[3, 4] Accounting upon the long series of transactions between these parties is permissible, not because of the void contractual relation, but because of what the parties actually did in the course of their dealings. But, in so far as the accounting was had upon the theory that the profits which appellant took for the making of loans were larger than the maximum interest rate allowed by the Illinois statutes, it must be said that under the law of Illinois transactions tainted with usury, but which have nevertheless been definitely settled and closed as between the parties thereto, cannot thereafter be made the subject of a recovery or accounting for the usurious interest payments. Dorothy v. Commonwealth Co., supra; Richter v. Burdock, 257 Ill. 410, 100 N. E. 1063; Lake v. Brown, 116 Ill. 83, 4 N. E. 773; Riddle v. Rosenfeld, 103 Ill. 600. This is likewise the law generally respecting recovery and accounting for transactions had pursuant to contracts void only for lack of power to enter into them. In Central Transp. Co. v. Pullman's Car Co., 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55, recovery was sought of rent specified to be paid by the Pullman Company under a lease to it of the cars of another sleeping car company. The court held that the lease was one which the parties to it had not the power to make, and that it was "wholly void and of no effect," and recovery under the lease was denied. But in a subsequent action, involving accounting between the same parties, respecting the same property, and under the same purported leasing contract, the same court, adhering to its previous conclusion of the invalidity and unlawfulness of the lease, said, respecting demand for accounting for the rents paid:

> "During the fifteen years elapsing from 1870 to 1885 no violation of the terms of the lease by either party is complained of, and we think the whole transaction between the parties during those fifteen years must be treated as closed, so that no examination should be made in regard to anything that happened within that time." Pullman's Car Co. v. Central Transp. Co., 171 U. S. 138, 18 Sup. Ct. 808, 43 L. Ed. 108.

See, also, St. Louis R. R. v. Terre Haute R. R., 145 U. S. 393, 12 Sup. Ct. 953, 36 L. Ed. 748; Spring Co. v. Knowlton, 103 U. S. 49, 26 L. Ed. 347; Thomas v. Railroad Co., 101 U. S. 71, 25 L. Ed. 950; Thomas v. City of Richmond, 12 Wall. 349, 20 L. Ed. 453; Leigh v. American Brake-Beam Co., 205 Ill. 147, 68 N. E. 713.

[5] The executed agreement here merely set out the basis for future dealings of the parties. If, after its execution, the Company had sent no accounts to appellant, that would have been the end of the business, for the contract distinctly states that the Company was not obligated to sell any accounts. While the contract, treated as a loaning agreement, is void, yet, in order to arrive at an understanding of what the parties actually did, it is proper and well to know what they mutually purported or intended to do, and resort may be had to anything that will throw light thereon—even for such purpose to the contract itself, however void as an obligation. What they actually did, viewed in the light of what they intended to do, must de-

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termine what, if any, of their many transactions were closed and settled. For such closure and settlement no particular form or ceremony was necessary. Receipts need not be passed nor formal declaration made. If the fair and reasonable deduction from the acts and conduct of the parties is that certain of their transactions were as between them closed and settled, they are closed and settled accordingly. The evidence bearing upon this subject is practically undisputed, the question being as to the legal effect to be given it.

After the execution of the contract the Company at once began sending accounts to appellant, each time making formal written assignment of the accounts sent. They were sent at first as often as once a week, and thereafter more frequently—as often as daily; but for some months prior to the end of the business the volume was much less. In each instance appellant paid (on the purported purchase price therefor) approximately 80 per cent. of the face of the accounts sent, and remitted the balance, less its charges, after the customer had fully paid the account, rendering an account of the full transaction. The accounts were practically all 60-day accounts, and, if not paid when due, the Company generally sent appellant check for the full amount of the unpaid account, and appellant would promptly settle with them for the amount withheld on the purported purchase price. Sometimes instead of cash they would send another account in the place of the one past due.

It is apparent that when all of the accounts upon which a particular advance had been made by appellant were settled by the customers, and the retained 20 per cent. adjusted between appellant and the Company, such transaction, be it sale, loan, or advance, was, as between these parties, considered wholly closed and settled. The testimony of the Orcutts is illuminating and convincing not only as to what the parties actually did, but also as to their intention and state of mind with respect to the closing of transactions. Louis Orcutt, the secretary, testified:

"When these various accounts were paid, the checks or remittance came to the F. H. Orcutt & Son Company, and we then transmitted that check in its original to the National Trust & Credit Company. That was the general practice. When they received the check they collected it through their bank, and then remitted to us 20 per cent. which they had withheld. That item was then closed and settled. At the time that second payment of 20 per cent. was made to us a sheet or document showing what accounts were thereby fully paid was sent us. I think it was called a remittance sheet. This remittance sheet referred to the account, and by reference to our books as to this account and by reference to the check we could see whether or not they had paid the entire price for the account. I always checked that up to be sure that they were right. I found them always right. The second payment of the account, which amounted to 20 per cent. of the face of the account less certain deductions that may have been made by the customers, was always made shortly after the account itself was paid. They were always absolutely correct in all of their dealings until the fall of 1912. * * * As to the accounts which had been paid up to September, 1912, the 20 per cent. referred to had been fully taken care of by the remittance sheets and the checks accompanying the same, except some on which there was a difference of opinion as to the amount due them. I mean that they were all taken care of, that the 20 per cents. were all paid except some few individual items. * * * There was an occasional

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mistake in their office as to matters of deduction. Occasionally items would creep up which I do not think were just under the contract. Up to September 1, 1912, these were invariably adjusted. All the questions which the National Trust & Credit Company raised were taken care of between us and their company by their auditors. But some questions that I raised were settled directly by correspondence."

It appears that on past-due accounts appellant charged the Company additionally at the rate of 1 per cent. per month, and Orcutt said:

"As a matter of protection we took up all accounts that had passed their net due dates; that we sent them our check nearly every day for more or less of an account. * * * They were always for the full face value. * * * The National Trust & Credit Company upon receipt of this check would receive them as any other checks received in settlement of an account; that is, they retained 20 per cent. margin plus or less the discount, as the case might be. That was the usual practice in our dealings for two and a half years or more. * * * I remember one of the representatives of the National Trust & Credit Company was at our place several times in the fall of 1912. He was there early in September, and we made settlement with him for all of the delinquent accounts."

Of these same matters F. H. Orcutt, president of the Company, testified:

"Continued to deal with the National Trust & Credit Company from the latter part of May, 1910, until September or October, 1912. During that time we sent them our bills receivable and received back their checks very promptly. We received 77 per cent. of the face of the bills receivable. We found all our bills 60-day paper, so we settled it on one proposition, 77 per cent. It was all 60-day paper. As we went along we received statements from the National Trust & Credit Company. We checked these over and filed them away, I suppose. * * * When we first began doing business with the National Trust & Credit Company we assigned accounts to them about once a week. Later we assigned accounts more frequently, sometimes every day. The settlements were made on the accounts which were not paid by the debtors when the auditor came around. He would fix them up and we would give him a check in full. We would give him a check for the face of the amount. * * * I let go of the affairs of the Company just before Thanksgiving, 1912, and turned it over to Mr. Miller. He is now one of the trustees. The business was in Mr. Miller's charge at that time. Mr. Miller was one of the five directors of the Company at the time this contract was made with the National Trust & Credit Company and continued active in the affairs of the Company ever since. Up to the time I let go of the business there had been practically no dispute between us and the National Trust & Credit Company. They had paid us all the moneys for all these accounts and made settlement for every account. Everything had been satisfactory up to that time, or reasonably so. They still had a large number of accounts which had not been settled for when I let go of the business. * * * We followed this matter up with very great care, and I think we got all of our money as fast as it became due."

It is evident that toward the end, when the Orcutt corporation was in deep water, there was considerably more trouble with the assigned accounts. In September appellant itself began collecting the accounts from the customers, who up to that time had not been informed of appellant's relation to them.

If, as between these parties, a settlement was effected on the basis of the transaction being sales, the fact that they were loans, and not sales, would not unsettle what had been theretofore in good faith set-

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tled. If the first transaction under the contract had been the only one, and the advance, collection of account, remittance, and disposition of the 20 per cent. had been made just as was done, and if then four years had passed before suit was brought to recover alleged usurious interest payments, it is scarcely conceivable that there would be difficulty in concluding that such transaction had been by the parties long settled and closed. No different rule should be applied if such first transaction had been followed by many others similar in kind. Advances and remittances were never general or "on account," but always bore direct relation to particular transactions and accounts, to which they were exclusively applicable.

From this evidence of appellee Company's officers, wholly apart from the contract itself, we cannot avoid the conclusion that very many of these transactions, particularly those in the earlier part of the series, if treated as loans, were fully repaid long before the beginning of this suit, and were deemed by the parties, as in fact they were, closed, settled, and ended. They were in respect to matters which involved no moral turpitude, the contract being void merely because of the legal incapacity of one of the parties to enter into it. Leigh v. American Brake-Beam Co., 205 Ill. 147, 68 N. E. 713. If, as Louis Orcutt testified, prior to the fall of 1912 the "20 per cents" were all settled, it follows that the accounts out of which they grew were settled, and that the several advances to the Company made on the basis of the accounts out of which the "20 per cents" arose were perforce likewise settled and ended. If the transactions were sales as purported, the settlement of the "20 per cents" completed payment of the purchase price; if loans, or mere advances, the settlement of the "20 per cents" indicates that the loans or advances were fully repaid. All the transactions which at the beginning of the suit were so disposed of should have been excluded from the accounting.

The various individual accounts purporting to have been sold to appellant are not to be regarded as each of them constituting a separate transaction, but each payment or advance made by appellant upon the strength of accounts which were sent on by the Company as the purported basis for such particular payment or advance by appellant should be considered as constituting a separate transaction, and to be regarded as closed and settled if and when all the accounts included in any such transaction have been fully paid and accounted for, or otherwise finally disposed of between appellant and appellee, so that at the time of the beginning of the suit (or the earlier repudiation by appellee of the purported contract, if this appear) nothing further remained to be done as between these parties respecting any one or more of the accounts included or involved in such separate transaction as herein defined.

The decree of the District Court is reversed, with direction to restate the account, and exclude therefrom all items which, under the foregoing views, were closed and settled.

EVAN A. EVANS, Circuit Judge (dissenting). I am unable to agree with the conclusions reached by the majority of the court.

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With the conclusion that the agreement under consideration was in fact a loan agreement I fully agree. Home Bond Co. v. McChesney, 239 U. S. 569, 36 Sup. Ct. 170, 60 L. Ed. 444. That it was beyond the corporate powers of the National Trust & Credit Company to loan money is conceded. That such a contract is therefore void under the laws of Illinois is also well established. Mercantile Trust Co. v. Kastor, 273 Ill. 332, 112 N. E. 988; Central Transportation Co. v. Pullman Palace Car Co., 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55. It follows, therefore, that the decree should be affirmed unless (as the majority of the court concludes) certain of the transactions were "closed."

It appears that outstanding accounts aggregating some $76,000 were in appellant's possession and given to secure unpaid obligations when the voluntary assignment occurred. All the loans and payments were made pursuant to the terms of the void contract. The excessive interest items as well as the so-called service charges were paid by the borrower upon the theory that a valid contract between the parties called for such payments. If we eliminate from the parties' transactions the contract and its influence upon the parties, there is nothing left but a few cash items on the side of the loaner and many smaller items of cash credited to the borrower. The sum totals cannot be made to balance, collectively or otherwise. A so-called closed or balanced account is spelled out of the record only by giving appellant credit for its 1 per cent. per month interest and allowing its expense and service charges—all as provided in the contract.

Such a settlement as furnished the basis for appellant's claim of a closed account was nothing but a ratification of the void contract. And it is thoroughly established that any contract malum in se is incapable of ratification. Westerlund v. Bear Mining Co., 203 Fed. 599, 612, 121 C. C. A. 627.

My conclusion is strengthened by the fact that the parties made a contract in writing before any moneys were advanced by appellant. In fact, the subsequent dealings were not separate and independent transactions, but were the fulfillment of the written contract referred to. This contract required appellant to "buy from said first party all acceptable accounts tendered it * * * and pay therefor the face value thereof, less the following discounts," etc. All the dealings between the parties were pursuant to this one illegal contract. Moneys may have been advanced at different times, and certain payments on the moneys thus advanced may have been made at other dates, but nevertheless all subsequent transactions of both parties were referable to this contract and determined by it.

Moreover, this is a suit in equity. Appellant has avoided the full consequences of its transaction because it is in a court of equity. Appellant saw fit to enter into a contract prohibited under the laws of the state of Illinois and in violation of its powers under its charter. Not satisfied with avoiding the full penalties that might result from its embarrassing position, it asks this court of equity that has required the borrower to repay all moneys borrowed together with legal interest to go one step further. It prays for the allowance of excessive

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interest and illegal charges. Seeking equity, appellant should do equity. Obtaining relief from the unfortunate position in which it has found itself, due to its illegal contract, it should offer to, and, if its consent be not forthcoming, be compelled to do equity. Equity is done only when the debtor pays back to the creditor under this one single written contract all moneys by it paid, together with interest thereon. The creditor does equity only when it repays to the borrower or gives to the borrower credit for the usurious and excessive sums taken by it under and by virtue of this illegal contract. Mercantile Trust Co. v. Kastor, supra.

Nor is this conclusion out of harmony with that reached in Pullman's Palace Car Co. v. Central Transportation Co., 171 U. S. 138, 18 Sup. Ct. 808, 43 L. Ed. 108. In that case a closed transaction was assumed. The court considered the question of its effect. Here I fail to find the facts showing that accounts were "closed."

Again, to hold otherwise it seems to me would defeat the plain purpose of the statute of the state of Illinois, long expressive of the public policy of that commonwealth. For if an illegal contract can be purged of its illegality by the simple device of drawing a new contract, thereby "closing" the old one, a simple and satisfactory plan has been provided for corporations to engage in a forbidden business. Likewise the worries of the usurer are over, for a simple and effective way has been provided whereby he can retain his excessive interest.

(259 Fed. 838)

OWENS BOTTLE-MACH. CO. v. KANAWHA BANKING & TRUST CO.

(Circuit Court of Appeals, Fourth Circuit. April 1, 1919.)

No. 1688.

1. PRINCIPAL AND AGENT ⟹123(12)—AUTHORITY OF AGENT—GUARANTEEING DEBT OF ANOTHER.

   Evidence *held* insufficient to establish authority of an agent to bind his principal by guaranteeing payment of the note of another.

2. PRINCIPAL AND AGENT ⟹190(1)—ACTIONS AGAINST PRINCIPAL—PROOF OF AGENT'S AUTHORITY.

   In an action against a principal in respect of an act of an alleged agent, the burden is on plaintiff to establish, not only the fact of agency, but that the act upon which he relies was within the agent's authority.

3. PRINCIPAL AND AGENT ⟹123(1)—LIABILITY OF PRINCIPAL TO THIRD PERSONS—AUTHORITY OF AGENT.

   Authority of an agent to borrow money for his principal, or to obligate his principal to pay the debt of another, is not to be inferred, without clear evidence that it has been granted.

4. EVIDENCE ⟹75—INFERENCE FROM FAILURE TO PRODUCE.

   That the party whose case is a denial, with the burden of proof resting upon his opponent, does not produce evidence within his reach, affords no ground for inference against him on the issue.

5. PRINCIPAL AND AGENT ⟹170(3)—UNAUTHORIZED ACTS OF AGENT—RATIFICATION.

   A principal cannot be bound by the unauthorized act of an agent on the ground of ratification, because, when first informed of what the

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agent has done, and called upon to be answerable therefor, he meets the demand with a general repudiation, which does not include an express denial of the agent's authority.

6. PRINCIPAL AND AGENT ⟹137(1)—UNAUTHORIZED ACTS OF AGENT—ESTOPPEL OF PRINCIPAL.

That money borrowed by a building contractor was used in carrying out his contract, and thus went into the owner's property, does not estop him to repudiate an unauthorized promise of his agent to see that the loan was paid, of which he had no knowledge.

7. BANKS AND BANKING ⟹154(9)—DEALINGS WITH DEPOSITORS—SPECIAL DEPOSIT.

Where defendant bank knew that a special account opened by plaintiff was for the purpose of advancing money to meet the pay roll of a contractor, who was constructing a building for plaintiff, and that the custom was for plaintiff, when a pay roll came due, to make a check on the account in favor of the contractor for the exact amount, which was used in meeting the pay roll, it cannot be held as matter of law that the deposit made by such a check was not a special deposit, which defendant would not rightfully apply on a note of the contractors.

In Error to the District Court of the United States for the Southern District of West Virginia, at Charleston; Benjamin F. Keller, Judge.

Action at law by the Owens Bottle-Machine Company against the Kanawha Banking & Trust Company. Judgment for defendant, and plaintiff brings error. Reversed.

Charles A. Schmettau, of Toledo, Ohio (Brown, Geddes, Schmettau & Williams, of Toledo, Ohio, and Brown, Jackson & Knight, of Charleston, W. Va., on the brief), for plaintiff in error.

Buckner Clay, of Charleston, W. Va. (George E. Price, of Charleston, W. Va., on the brief), for defendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

KNAPP, Circuit Judge. Plaintiff in error, plaintiff below, brought this action against defendant, Kanawha Banking & Trust Company, to recover the sum of $6,692.85, with interest from March 9, 1918, which sum is alleged to have been deposited with defendant on that day as a special deposit for a specific purpose, but which defendant wrongfully diverted to another purpose, as will presently be explained. Besides denying that the deposit was special, defendant pleaded a set-off of $15,000, being the amount of a note of M. Rabbitt & Sons Company, made on or about September 21, 1917, which it claims the plaintiff promised to pay. At the trial, and on the testimony relating to the cause of action set out in plaintiff's declaration, the court below directed a verdict for defendant, thereby holding in effect that as matter of law the deposit in question was not a special deposit. The evidence relating to defendant's set-off was submitted to the jury, with the instruction that, if they found for defendant, they should credit on the $15,000 the amount of the deposit sued for, and also a small balance which M. Rabbitt & Sons Company had in bank when that deposit was made. Under these rulings the jury returned a verdict in favor of defendant for $8,702.02, and plaintiff brings the case

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here on writ of error. A more detailed recital of facts will disclose the questions to be decided.

Under date of February 20, 1917, the Owens Bottle-Machine Company, plaintiff, an Ohio corporation, having its principal place of business at Toledo, entered into contract with the firm of M. Rabbitt & Sons Company, also of Toledo, for the construction of a glass plant at Kanawha City, near Charleston, W. Va. The contract provided, among other things, "that the work shall be under the supervision and direction of the De Vore-McGormley Company," and "according to the drawings and specifications" furnished by that concern. The contractors shortly afterwards came to Charleston and commenced operations. March 16, 1917, they opened an account with defendant, which continued until March 9, 1918, the date of the last transaction here involved. Some time in the spring of 1917 plaintiff sent to Charleston one A. J. Martin, an employé, to assist the contractors "in the erection of the plant," as one of them says, and, as Martin himself says, "to check up the work on the construction of the plant at Kanawha City." Just what his duties were does not otherwise appear. He was the only representative of plaintiff continuously on the ground, though certain of its officials visited the plant "about every 30 days." Whether or not he had authority to pledge the credit of plaintiff, or to guarantee the payment by it of moneys loaned the contractors by defendant, is the vital question in the case.

We take up this question first, because for present purposes it may be assumed, as defendant contends, that, if plaintiff has been rightly charged with liability for the set-off of $15,000, it does not matter whether its deposit of March 9, 1918, was special or general, since it has received full credit for the amount in the verdict of the jury. What Martin did and the evidence of his authority will therefore be examined. On April 16, 1917, he opened an account with defendant in the name of "A. J. Martin, Cashier," which continued until March 9 of the following year. His deposits were all of small amounts, and the balance to his credit at no time more than a few hundred dollars. Aside from a transcript of this account, the record shows nothing relating to Martin until August 17, 1917, when he went with M. J. Rabbitt to defendant's bank and a loan of $5,000 was made to Rabbitt's firm. The business was transacted with the cashier, Mr. Lewis, whose testimony as to what took place is this:

"Mr. Martin came in with Mr. Rabbitt to see me in August, 1917, and a conversation took place in regard to negotiating a loan for $5,000. Mr. Rabbitt said that M. Rabbitt & Sons Company needed that much money, and Mr. Martin told me that if I would loan it he would see that it was paid, and in anticipation, as I was told, of the pay roll estimate due the Rabbitts. I loaned the money for 20 days. I took a note from the Rabbitts at that time, which was paid by M. Rabbitt & Sons later, 2 or 3 days after maturity, but charged to their account."

It is evident that the contractors were then embarrassed and that their financial condition soon became extremely serious. The next incident, and the most important, occurred on the 21st of September, when Martin again went to the bank with Rabbitt to negotiate an-

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other loan. As the cashier was absent, they applied to the president, Mr. Staunton, who testified to the transaction as follows:

"Well, he came in with Mr. Rabbitt, and they jointly explained the reason of their coming, that they wanted to borrow—wanted to get $15,000 for M. J. Rabbitt & Company; and I called Mr. Martin to one side and said, 'Mr. Martin, we haven't got enough information about M. J. Rabbitt & Sons Company to extend any loan of this size; we cannot make the loan unless your company will pay it;' and he says, 'It is due them, or will be due them, within this month's estimate, and we will see that it is paid;' and I said, 'All right, we will let them have the money; that is, $15,000.' The advance was then made on the note of M. Rabbitt & Sons, and the proceeds of the note credited to their account. I took a note from M. Rabbitt & Sons Company, which was made out by some one else in the bank. That was all the conversation that occurred at that visit, so far as I recall it. I know nothing about the renewal of the note personally. The original note was never paid."

[1] In view of this testimony, it is to be taken for granted that Martin made the promise on which defendant relies; his authority to make it is, as already said, the vital question. Prior to the date of this loan to the contractors, though just when is not shown, plaintiff in its own name opened an account with defendant and deposited large sums from time to time. Checks on that account were drawn only at Toledo, and the bank knew that Martin had no authority to check against it. Later, when plaintiff was obliged to advance considerable sums for pay rolls and the like, in order to keep the construction work going, another and separate account was opened in the name of "A. J. Martin, Special." This account was commenced on the 13th of October, and continued until the 9th of the following March, and it was upon this account that Martin on that day drew the checks which plaintiff claims were placed to the credit of the Rabbitt firm as a special deposit. Coming, now, to the proof of Martin's authority, we find after careful search only the following:

Martin himself, as a witness in support of plaintiff's cause of action, testified:

"I was employed by the Owens Bottle-Machine Company at Charleston from September or October, 1917, to March, 1918, to check up the work of the construction of the plant at Kanawha City."

M. J. Rabbitt testified:

"The only one who represented the Owens Bottle-Machine Company on the ground was Mr. A. J. Martin. * * * Martin never paid any estimates. The checks always came from Toledo. All matters of extras and allowances of extras under our contract we took up with the De Vore-McGormley Company, and they decided them. We took up nothing of the kind with Martin, except what he ordered to be done."

James E. Rabbitt testified:

"The Owens Company had a man to represent them there—Mr. Martin. I do not know what his duties were. He was sent there to assist us in the erection of the plant. They did not have any other man here continuously. Mr. Martin had men under him. Martin assisted us in everything we asked him to do. He ordered us to do some things. Mr. Cochrane, the factory manager of the Owens Company, told me he would send him down here to assist us. He was on the ground all the time while the work was going on. Some of the officials of the Owens Company were around here about every 30 days."

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Staunton, defendant's president, testified:

"I know, and at that time [when the loan was made] knew, that Martin was employed by the Owens Bottle-Machine Company. So far as we knew, he was the only representative they had here, and he was engaged in work on the Kanawha City plant. * * * I don't know from my personal knowledge what Mr. Martin's duties were—only what I got from Mr. Martin and Mr. Rabbitt, that he was the representative of the Owens Bottle Machine Company. When I met these various officials of the Owens Bottle-Machine Company, I don't recall that I ever made any inquiry as to what Martin's standing was, or what his authority was."

[2, 3] In our opinion, this comes far short of proving that Martin, a mere employé, who appears to have been little more than an inspector, had authority to pledge the credit of plaintiff, or to bind it by his promise to pay the loan which defendant made to the contractors. It is of course an elementary rule of law that a person dealing with an alleged agent is bound to ascertain his authority, and that, when suit is brought against the principal in respect of an act of such agent, the burden is upon the plaintiff to establish, not only the fact of agency, but that the act upon which he relies was within the agent's authority. It is likewise elementary that the authority of an agent to borrow money for his principal, or to obligate his principal to pay the debt of another, is not to be inferred without clear evidence that it has been granted. 31 Cyc. 1395. In Exchange Bank v. Thrower, 118 Ga. 433, 45 S. E. 316, it is said:

"A power so perilous is not to be implied from acts which in other matters less hazardous might create an agency. It must be conferred in express terms, or be necessarily and inevitably inferable from the very nature of the agency actually created. So strict is the rule that it will not be presumed even from an appointment of one as general agent, unless the character of the business or the duties of the agent are of such a nature that he was bound to borrow in order to carry out his instructions and the duties of the office."

If this be true as to authority to borrow money for the principal, it is at least equally true as to authority to pledge the principal's credit, or to guarantee that the principal will pay a loan made at the agent's request to a third party. We need not further discuss the point. It is enough to say that the meager and inconclusive testimony above quoted, if it have any probative force at all, fails manifestly, as we think, to overcome the burden resting upon defendant, or to furnish that "clear evidence" of authority which the law in such case requires.

Holding, then, that the direct testimony, so to call it, was quite insufficient to prove Martin's authority, as seems also to have been the view of the learned trial judge, we turn to the other considerations which defendant here urges in support of the judgment; and these will be briefly reviewed, without reference to the distinction between ratification and estoppel, both of which are asserted.

[4] In the course of the oral argument it was suggested that Martin's authority was inferable from the fact that, though present in court, he was not called as a witness, and that plaintiff offered no testimony, on the issue raised by defendant's plea of set-off. The rule of law is otherwise. In Wigmore on Evidence, vol. 1, par. 290, subsec. 5, it is stated thus:

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"The opponent whose case is a denial of the other party's affirmation has no burden of persuading the jury, therefore, until the burden of producing evidence has shifted, he has no call to bring forward any evidence at all, and may go to the jury trusting solely to the weakness of the first party's evidence. Hence, though he takes a risk in so doing, yet his failure to produce evidence cannot at this stage afford any inference as to his lack of it; otherwise, the first party would virtually be evading his legitimate burden."

[5] The defendant presses the proposition which is stated in its brief as follows:

"If the Owens Company knew the facts, and failed to repudiate the act of Martin, its failure to do so would amount to a ratification. This is especially so where such failure was the cause of the trust company's not getting the money from the contractors."

Now, despite the contrary inference urged by counsel, we discover nothing of record to show, or which would justify a jury in finding, that plaintiff had any knowledge of Martin's alleged promise until so informed by letter of defendant's cashier under date of November 28, 1917. The answer to this letter was written on the 3d of December by Assistant General Manager Biggers, who seems to have been the official in charge of the Charleston project, or at least fully familiar with it. He begins by saying:

"The statements contained in your letter of November 28th are indeed a surprise to us. Your version of this transaction is quite at variance with the information which we have received from time to time from Mr. Martin, and from Mr. Rabbitt himself. It is also very different from the impression which I received from your president, Mr. F. M. Staunton."

He then goes into some detail of his interview with Staunton at Charleston "about October 15th," and concludes as follows:

"We have a friendly interest in your institution and in the Rabbitt firm, and we certainly do not want to see you lose any money as the result of having assisted them financially; but we can see no grounds whatever for assuming that we are responsible for the payment of Rabbitt's note, or that we should at this stage of the negotiations assume such responsibility."

Several letters between the parties followed during the next three months, but it appears to us, and can scarcely be argued otherwise, that none of them contains anything more favorable to defendant than the passage just quoted from the first, and it therefore follows that the claim of ratification, so far as the correspondence is concerned, rests on the fact that Biggers in that letter did not expressly disavow the authority of Martin to promise that plaintiff would pay the Rabbitt note, but only made the broad assertion that he saw "no grounds whatever" for holding the plaintiff responsible. Taking all the circumstances into account, we are clearly of opinion that the mere failure of Biggers at the outset to deny specifically the authority of Martin furnished no basis for inferring that he did in fact have authority, or that plaintiff had ratified his act. It cannot be the law that a principal runs the risk of being bound by the unauthorized act of his agent, because, when first informed of what the agent has done, and called upon to be answerable therefor, he meets the demand with a general repudiation, which does not include some particular ground

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upon which he disclaims liability. And so it has been held by courts of high standing. Droste v. Wabash R. R. Co., 153 App. Div. 160, 138 N. Y. Supp. 203; Brown v. Henry, 172 Mass. 559, 52 N. E. 1073. In the latter of these cases, both of which appear directly in point, it is said:

"The naked question is presented whether, if a principal, on learning of an unauthorized contract of an agent, repudiates it, giving a reason for so doing which proves to be without foundation, such repudiation is equivalent to an adoption of it. In the absence of anything beyond this to work an estoppel, we are of opinion that it is not."

In connection with this correspondence it seems to us that some significance attaches to the interview mentioned between Biggers and defendant's president. It occurred about the time the original Rabbitt note came due and was renewed for 30 days. Staunton admits that he made inquiry of Biggers as to the financial standing and credit of the contractors. If he then understood or claimed that plaintiff was obligated to pay that note by virtue of Martin's promise, as is now contended, it seems most surprising that he made no mention of it in the course of their conversation; and his explanation that he supposed Biggers knew all about it is by no means convincing. On the other hand, if Biggers was fully aware of what Martin had done, as defendant would have us believe, it is equally surprising, in view of what Staunton was asking him, that he did not allude to such an important transaction. The inference is not difficult to draw.

[6] But defendant further contends that Martin's promise was ratified, or that plaintiff is estopped from repudiating it, because it got and kept the substantial benefit of the loan in question. It appears to be the fact that most of the $15,000 was applied by the Rabbitts in payment of materials used or labor employed in constructing the Charleston plant. But all this they were bound to furnish under their contract, and for it they were paid the contract price before plaintiff had notice of Martin's alleged promise. As above held, there is no evidence that plaintiff had such notice until the receipt of defendant's letter of November 28th, and long before that any materials paid for out of the loan had been so incorporated in the building as to be incapable of removal. There was nothing then that plaintiff had not the contract right to keep, or that it had the power to surrender. To say in such case that plaintiff must be deemed to have ratified the unauthorized act of Martin, because it retained what it could not return, is to say in effect that there could be no repudiation of his act without giving up the $15,000. We cannot sustain the contention. In our judgment the rule of law applicable to the facts here presented is stated in Mechem on Agency, § 439, as follows, citing numerous cases:

"So, as has been stated, acceptance and receipt of the benefits must, to work a ratification, have been voluntary, and must find their warrant in rights flowing from the act. For, if the principal had no choice, if the benefits could not be separated from something to which he was in any event entitled, or if his act was not confirmatory, as where he would have been entitled to the same benefit independently of the act in question, the acceptance and receipt under such circumstances would not constitute a ratification."

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Nor do we find any evidence, or even an attempt to show, that defendant was misled to its prejudice by the alleged failure of plaintiff, in Biggers' letter of December 3d, to repudiate the transaction on the ground of Martin's lack of authority. It is not perceived that defendant thereafter did anything, or refrained from doing anything, which resulted to its disadvantage, because Biggers did not in that letter explicitly deny the authority of Martin to guarantee for plaintiff the payment of the Rabbitt note. Defendant was perfectly aware from what Biggers wrote that plaintiff disclaimed responsibility for Martin's alleged act and refused to be bound by it, and defendant was then at full liberty to take any action it saw fit for the recovery of its loan to the Rabbitts. It is wholly unproven that defendant was misled or prejudiced in any respect by the position which plaintiff took, when first apprised of Martin's promise, or by its subsequent attitude. In short, we find no basis for the asserted estoppel.

Without argument or citation of decisions, we content ourselves with merely expressing the opinion that, if Martin's promise was authorized or afterwards ratified, it was in legal effect an original promise of plaintiff, and therefore not within the statute of frauds.

[7] Having reached the conclusion, for the reasons above outlined, that the evidence of record does not sustain the verdict for defendant on its plea of set-off, we return to the proofs in support of the cause of action set up in plaintiff's declaration. These proofs are to the following effect: In October, 1917, plaintiff commenced advancing money to the contractors for the payment of their bills and pay rolls, as heretofore stated, and for that purpose opened an account with defendant in the name of "A. J. Martin, Special." Martin testified that at the time of opening this account, or at least in January, 1918, he explained its purpose to defendant's cashier. Under the method of business adopted, all moneys sent by plaintiff to meet the bills and pay rolls of the Rabbitt Company were deposited by Martin to the credit of that account. When a pay roll became due, Martin drew his check for its exact amount, deposited it to the credit of the Rabbitt Company, and got the money on its check to the order of "Cash." By agreement of January 21, 1918, plaintiff took over the work which the Rabbitts had contracted to do and proceeded itself to complete the Charleston plant. Under this agreement plaintiff assumed sundry unpaid labor and material bills of the Rabbitt Company, and the latter turned over to plaintiff all its tools, appliances, and materials on or in transit to the work, together with its entire organization, and James E. Rabbitt was employed as superintendent at a fixed salary. The Rabbitt Company was released from all financial responsibility in respect of the work as from the date of the new agreement. Other details of the arrangement may be omitted. After it was made, the prior method of providing for the pay rolls was continued; that is to say, Martin would draw a check on the "Special" account for the necessary sum, deposit the same to the Rabbitt Company's credit, and then draw the money on the latter's check to the order of "Cash"; and so the matter went on until the 9th of March.

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Meanwhile defendant, finding itself unable to collect the $15,000 which it had loaned to the Rabbitts, and claiming that plaintiff was liable for the same, was having the correspondence to which we have referred. A plan was apparently formed to secure at least part payment of the Rabbitt note, or, as the cashier says, "to find out who was going to pay, whether M. Rabbitt & Sons Company or the Owens Bottle-Machine Company." Accordingly he began to watch the account of the Rabbitt Company, and instructed the tellers to let him know when they made a deposit. On March 9th two pay rolls of plaintiff became due—one a general labor pay roll for $6,450.80, and the other a bricklayers' pay roll for $242.05. Following the usual custom, one Clay, an employé of plaintiff, who had been in the employ of the Rabbitt Company and in the habit of handling the pay rolls, both before and after the January agreement, telephoned the bank to make up the "change list" for the "Owens Company." He advised the bank over the telephone, "how many twenties, how many tens, how many fives, how many ones, how many quarters, nickles, and dimes, I wanted," and that he would be down later to get the money. He then procured two checks, drawn by Martin on the "Special" account, one for $6,450.80 for the general labor pay roll, and another for $242.05 for the bricklayers' pay roll. These checks were drawn to the order of the Rabbitt Company and indorsed for that firm by M. J. Rabbitt. At the same time Clay procured two checks for the same amounts drawn by the Rabbitt Company to the order of "Cash." These checks respectively bore certain notations which showed that they were drawn to meet pay rolls.

When Clay called up the bank in the morning, he gave the amount and "change list" of the general pay roll only. Later he went to the bank, taking the four checks with him, and handed them to Green, one of the tellers. Green took the deposit and gave Clay a duplicate receipt. Clay says that at that time he saw the money for the general labor pay roll lying on the desk, done up in a canvas bag, and that he knew it was his pay roll because it was marked by a small tag tied to the bag on which was written "Owens Pay Roll." As he had not given the bank the change list for the smaller pay roll over the telephone, he gave it to Green personally at the teller's window. Green made up this pay roll, placing the necessary coin and currency in a canvas bag which he left near the window. Clay then handed him the Rabbitt Company's checks, which Green thereupon pushed through the window to the adjoining office, telling Clay that he had given them to Mr. Lewis, the cashier, and that Clay would have to see Mr. Lewis. The upshot was that the bank refused to pay the Rabbitt Company's checks and instead credited the same on the $15,000 note. Lewis admitted that he knew a deposit of $6,692.85 had just been made, that he was told so by Green, and also knew that the Rabbitt checks presented for payment at the same time were for the same aggregate amount. It appears to us not doubtful, and a jury would certainly be warranted in finding, that Green and Lewis both knew that the Owens Company's checks were deposited solely to provide

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funds to meet the Rabbitt Company's checks, and that the latter were drawn solely to provide cash for the two pay rolls.

We deem it unnecessary to discuss these facts at any length. The mere statement of them seems to be sufficient to show that the learned trial judge was in error in holding as matter of law that the deposit thus made was not a special deposit. We are not prepared to say, nor is it needful now to decide, that a verdict should have been directed for the plaintiff on this issue; but we do hold that it was at least a question for the jury under proper instructions. The only proof of knowledge on the part of the bank essential to plaintiff's case was proof that the bank, when it accepted the deposit, knew of the purpose for which it was made, and that the bank had such knowledge appears practically undisputed. Even if it be assumed, as defendant contends, that it did not know that Clay represented the plaintiff, but supposed him to be an agent of the Rabbitt Company, that fact would not suffice to defeat the plaintiff's right to recover. On that assumption Clay was the agent of an undisclosed principal, and it has long been settled that an undisclosed principal may sue on agreements made by and with his agent, although the fact of such agency was unknown to the other contracting party. Baldwin v. Bank, 1 Wall. 234, 17 L. Ed. 534; Ford v. Williams, 21 How. 287, 16 L. Ed. 36. Without reviewing the testimony in greater detail, or indulging in further comment, we repeat our conviction that plaintiff was clearly entitled to have the question submitted to the jury.

It follows that the judgment must be reversed, and the cause remanded, with instructions to grant a new trial.

Reversed.

(259 Fed. 847)

COASTWISE LUMBER & SUPPLY CO. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. May 20, 1919.)

No. 237.

CRIMINAL LAW ⟹1023(3)—APPEAL—"INTERLOCUTORY ORDER."

An order of a District Court denying the petition of defendants in a criminal case for return of books and documents seized as having been used in commission of a felony, under search warrants issued pursuant to Act June 15, 1917, tit. 11, § 2 (Comp. St. 1918, § 10496½b), and held as evidence, whatever the proceeding may be entitled, is an interlocutory order in the criminal case, and under Judicial Code, § 128 (Comp. St. § 1120), is not reviewable by the Circuit Court of Appeals.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interlocutory Order.]

Manton, Circuit Judge, dissenting.

Appeal from and in Error to the District Court of the United States for the Eastern District of New York.

Criminal prosecution by the United States against the Coastwise Lumber & Supply Company. In the matter of the books and papers of the Coastwise Lumber & Supply Company. From an order deny-

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ing its petition for return of such books and papers, the company appeals and brings error. Dismissed without prejudice.

John J. Curtin, of New York City, for appellant.

James D. Bell, U. S. Atty., of Brooklyn, N. Y.

Before WARD, ROGERS, and MANTON, Circuit Judges.

WARD, Circuit Judge. The Coastwise Company, out of abundant caution, has taken both an appeal and a writ of error in this case. The proper remedy is the writ of error, and we shall take no further notice of the appeal.

The subject of review is an order of the United States District Court for the Eastern District of New York dated February 17, 1919, denying the petition of the Coastwise Company dated January 11 for a return of its books, papers, and memoranda impounded by an ex parte order of the District Court dated November 25, 1918, so that they might be used by the government in the trial of indictments pending against the Coastwise Company and 15 individual defendants.

November 7, 1918, the individual defendants were arrested; the indictments against all the defendants were found November 22, and the books, papers, etc., were originally seized under search warrants issued by United States commissioners under the act of June 15, 1917, c. 30, 40 Stat. 217, as being property used as means for committing a felony, viz. a conspiracy to defraud the United States in violation of section 37 of the Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1906 [Comp. St. § 10201]). One warrant was issued in the Eastern district of New York November 15, 1918, one in the Southern district November 16, and one in the district of New Jersey on the same date.

November 22, 26, and 27 the Coastwise Company demanded hearings before the respective commissioners under sections 15 and 16 of title 11 of the act of June 15, 1917 (Comp. St. 1918, §§ 10496¼o, 10496¼p); but the commissioners in the Eastern and Southern districts of New York refused to proceed further because of the impounding order, and, though the commissioner in the district of New Jersey vacated the search warrant issued by him, the United States marshal of that district had already handed over to the United States attorney for the Eastern district of New York the books and papers seized under it.

The government at the outset makes the objection that the order is interlocutory, and therefore not appealable, because our appellate jurisdiction is restricted to final decisions of the District Courts, with exceptions not material here. Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1133 [Comp. St. § 1120]), § 128.

It seems to us quite manifest that the search warrants were issued in the criminal action. They describe the property authorized to be seized as being used to commit a felony, viz. a conspiracy to defraud the United States in violation of section 37 of the Penal Code. The individual defendants had been already arrested on this charge, and all the defendants were under indictment before the Coastwise Company made its demand for a hearing before the United States

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commissioners under sections 15 and 16 of title 11 of the act of June 15, 1917, and of course before this petition was filed in the District Court.

It may be suggested that the petition was an independent proceeding because the notice of motion and the affidavit in support of it were entitled "In re Books and Papers of the Coastwise Lumber & Supply Company, a Corporation," and the subsequent proceedings were entitled in a similar way. We regard the form of title used as of little importance. The material consideration is whether the demand was made in the criminal action or as an independent special proceeding. A defendant cannot make an interlocutory order final by the choice of any particular form of title. All the earlier proceedings were entitled in the criminal action "United States of America against Coastwise Lumber & Supply Company, Inc.," and the other defendants. The particular order sought to be reviewed describes the books and papers as impounded "to aid the government in the prosecution of indictments against the said corporation and other defendants mentioned in said indictments," and in his opinion the District Judge describes the Coastwise Company, the petitioner, as the defendant, saying: "* * * Inasmuch as it appears that all of the papers are absolutely necessary to the government's case against the defendant, I am not disposed to interfere with the impounding order."

In the case of Wise v. Mills, 220 U. S. 549, 31 Sup. Ct. 597, 55 L. Ed. 579, the District Court entered an order committing the United States attorney for contempt, because of his refusal to obey its order to return books and papers of the defendant in a criminal action seized without a warrant. Upon his writ of error the Supreme Court held that the order committing for contempt was final as to the United States attorney because, he not being a party to the criminal action, nothing more remained to be done as far as he was concerned, while it held the order to return the defendant's books and papers was interlocutory.

When one not a party to the action has been committed for contempt, the order is final and appealable as to him (Nelson v. United States, 201 U. S. 92, 26 Sup. Ct. 358, 50 L. Ed. 673; Alexander v. United States, 201 U. S. 117, 26 Sup. Ct. 356, 50 L. Ed. 686); and when there is no action pending a demand for a return of books and papers seized is of course an independent special proceeding (Perlman v. United States, 247 U. S. 12, 38 Sup. Ct. 417, 62 L. Ed. 950; Veeder v. United States, 252 Fed. 414, 164 C. C. A. 338).

Because it is not before us, we express no opinion upon the question whether this wholesale seizure of the Coastwise Company's books and papers was an infringement of its rights under the Fourth and Fifth Amendments of the Constitution of the United States, but, because the order before us is interlocutory, the writ of error is dismissed without prejudice.

MANTON, Circuit Judge (dissenting). I regret that I cannot concur in the prevailing opinion. The majority of the court do not express their opinion as to this seizure, but the seizure of the books and papers

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in this record is illegal, and therefore the constitutional rights of the petitioner were violated. Then, if the seized books and papers be used upon the trial or be received in evidence at the trial of the indictment and a verdict of guilty be rendered, the conviction must be reversed. But the majority of the court hold that the refusal of the district judge to order their immediate return is not a final order, and therefore is not subject to review by this court.

The order appealed from was entered on the 17th of February, 1919, and denied the application of the petitioner, the Coastwise Lumber & Supply Company, a corporation, for the return of its books and papers which were impounded with the court by its order. It recites:

> "It is ordered that the motion for an order directing the return of said papers be, and the same hereby is, denied, upon the ground that said papers have been duly impounded by this court."

The books and papers in question were taken under writs of seizure and alleged search warrants issued against the petitioner by the United States commissioners in the Eastern and Southern districts of New York and the district of New Jersey. The warrant for the seizure of the books and papers was executed about the 16th of November, 1918. This warrant was entitled "United States v. Coastwise Company et al." On November 22, 1918, the defendants were indicted, and on the 26th of November, 1918, an affidavit was filed with the commissioner denying the charges and demanding a hearing that the warrant be vacated; this pursuant to a provision of the Espionage Act (see sections 1 and 2, tit. 11, chap. 30, enacted by Congress June 15, 1917 [Comp. St. 1918, §§ 10496¼a, 10496¼b]). After the books and papers were obtained pursuant to the executed warrant, an impounding order was granted upon application of the assistant United States attorney, and this gave possession and control of the books and papers to the court. This proceeding was entitled as a special proceeding "In the Matter of the Application in re Books and Papers of the Coastwise Lumber & Supply Company, a corporation." An application was made before the commissioner for the Eastern district of New York for a hearing as to the return of the books and papers, which was denied.

It appears many of these books and papers were seized in the Southern district of New York, and on November 19th delivered to the assistant United States attorney, who brought them to the Eastern district, where they were impounded pursuant to the order therefor on November 25th. The commissioner for the district of New Jersey on December 9, 1918, vacated the warrant of search and seizure.

After all these proceedings, on January 10, 1919, this petitioner made a demand, in the Eastern district of New York, for the return of the books and papers. This was refused. As was its right, the petitioner then filed its petition in the District Court for an order "requiring the return of certain books and papers which were heretofore taken by virtue of certain alleged warrants of search and seizure issued against the petitioner by the commissioner for the Eastern district of New York, the commissioner for the Southern district of New York, and the commissioner of New Jersey, and for such other

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and further relief as justice requires." This proceeding is entitled "In re Books and Papers of the Coastwise Lumber & Supply Company, a Corporation."

In support of this application there were presented affidavits of the president of the corporation, its attorney, and an office employé who had charge of its books. These affidavits were similarly entitled. The District Judge, in an opinion filed with the same title, denied the application, and an order was entered thereon entitled "In re Books and Papers of the Coastwise Lumber & Supply Company, a Corporation." The District Judge said:

> "Were it not for the existence of the impounding order, I should have no hesitation in directing the testimony to be taken so that such books and papers as might be found to have been improperly taken or held could be restored without delay to persons from which they were taken, as provided in section 16 of [title 11 of] the Espionage Act."

But, further, he concluded that, inasmuch as the court had power to impound the papers pursuant to such an order made, he refused to direct the return of the papers.

The petitioner had five places of business, and the seizure was made in its offices, and also in the law offices of its attorneys. Their offices are not in any way connected or even in the same building with the petitioner. The warrant was issued upon an affidavit which recited that "certain papers were used as a means for committing a felony, to wit, a conspiracy to defraud the United States in violation of section 37 of the Penal Code, said property being that described as follows: Books, ledgers, invoices, delivery tickets, writings, papers, correspondence, checks, check stubs, bills, way bills, bills of lading, receipts, and journals, the same being described in affidavits of Mitchell Dawson and the supporting affidavits of William A. Weed and Valentine W. Corell."

Dawson swore that he "had been informed by various persons in his official capacity as sergeant, military intelligence corps, United States army, learned and found facts which caused him to believe that the commission of said felony, to wit, conspiracy to defraud the United States government, has taken place."

Weed's corroborating affidavit stated that he "has probable cause to believe that a felony has been committed," but he does not specify information which gives him this probable cause to believe, nor does he state that he believes the statements which were made to him.

The concealment of the papers is alleged to be in the offices and yards of the corporation. It is difficult to conceive of the concealment of papers which are in the regular place of business of a corporation or even at the office of its attorney. The corroborating affidavit of Corell states, and without furnishing further information as to what he has heard, that because of certain conversations with certain persons he has probable cause to believe that the other defendants were co-conspirators with the petitioner in defrauding the United States government.

To obtain a warrant under this provision of the Espionage Act, under which this proceeding was instituted, there must be some satis-

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factory legal proof; that there is probable cause to believe that a crime has been committed; that the books and papers to be taken were means or instruments through which the crime was committed; and that the books and papers were concealed.

Section 3 of title 11 of the act (Comp. St. 1918, § 10496¼c) provides that a search warrant cannot be issued but upon probable cause, supported by an affidavit naming or describing the persons, and particularly describing the property and the place to be searched. Section 5 (section 10496¼e) provides that the affidavits or depositions must set forth the facts tending to establish the grounds of the application; of probable cause for believing that they exist.

In this application for the return of its books and papers, the petitioner relied upon the Fourth Amendment to the Constitution, which provided the limit beyond which Congress may not go in authorizing search warrants. It provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

It was the intention of Congress in the passage of the Espionage Act to observe the limitations of this constitutional provision. Section 2 of title 11 of the Espionage Act provides that property and papers may be seized if stolen or embezzled in violation of the laws of the United States, or if the property is used as a means for committing a felony; and then it may be taken on a warrant from any house or other place in which it may be concealed, or from the possession of the person by whom it was used in the commission of an offense, or any other person in whose possession it may be. The Circuit Court of Appeals for the Seventh Circuit, in Veeder v. United States, 252 Fed. 414, 418, 164 C. C. A. 338, 342, said:

"One's person and property must be entitled, in an orderly democracy, to protection against both mob hysteria and the oppression of agents whom the people have chosen to represent them in the administration of laws which are required by the Constitution to operate upon all persons alike.

"One's home and place of business are not to be invaded forcibly and searched by the curious and suspicious; not even by a disinterested officer of the law, unless he is armed with a search warrant."

Under the provision of the Espionage Act, and under the settled rules of law as laid down by the Supreme Court (Boyd v. United States, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746; Weeks v. United States, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177), search warrants can only be issued where the facts are set forth under oath, and not upon suspicions, surmises, or innuendoes. The facts must be stated which, when the law is properly applied to them, at least tend to establish the necessary legal conclusion that there is probable cause for believng that the crime has been committed. Whether entry shall be made into the home of the accused or the business place of the corporation must be determined by the facts set forth in the affidavit, and not by mere rumor or hearsay or suspicion. Indeed, the legal conclusion of probable cause is

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not for the affiant, but is a duty delegated to the judge who issues the warrant; and he can only draw such a conclusion upon sworn statements of fact. The Constitution does not protect petitioner's property that has been used in the commission of a felony, and it does not permit the seizure of its books and papers which were not used as a means of committing a felony. The latter class of papers are immune from seizure; therefore the necessity of a proper description of the papers, and a plain statement of fact that the papers seized were used in the commission of a felony. Therefore the necessity of reliable statements of fact to aid the judicial officer in reaching the legal conclusion as to probable cause. There must be some positive statement which subjects the affiant to the charge of perjury if he falsely swears in his affidavit. Veeder v. United States, supra. An application of these rules of law to the affidavits upon which this search warrant was issued, demonstrates its invalidity, and that it was improperly issued and should have been vacated by the District Judge.

If the seizure was illegal, and therefore the constitutional rights of the appellant violated, upon what authority of law can the impounding order be sustained? This proceeding resulted in a compulsory turning over of the books and papers to the court. It was not a voluntary surrender of the property or its possession, and the District Judge could not strengthen or rectify the unlawful seizure by granting an impounding order.

Justice McKenna said in Perlman v. United States, 247 U. S. 13, 38 Sup. Ct. 417, 62 L. Ed. 950, speaking of the protection of the Fourth and Fifth Amendments of the Constitution and the right of seizure:

> "They preclude, of course, compulsion, either upon the individual, or, under some circumstances, his property; nor is it a condition or part of compulsion that there be an actual entry upon the premises, an actual search and seizure. The principles preclude as well the extortion of testimony or detrimental inferences from silence or refusals to testify."

Perlman, in the case cited, was refused his exhibits because he delivered them for use upon the trial and even though he owned the exhibits. It was said that "the criterion of immunity, not the ownership of property, but the physical or moral compulsion" exerted, is the test. If the initial taking was a trespass against property and an invasion of the constitutional protection, it is tantamount to governmental extortion, and the court could not lawfully continue the seizure by issuing an impounding order. Perlman v. United States, supra. The test is the manner in which the property was obtained, and not the mere fact that the accused has a title to the property in question. In my opinion, the District Judge was not precluded from returning these books and papers which were illegally seized because there was in force and effect an impounding order.

This court has power to review a final order. Interlocutory in law means not that which decides the cause, but that which only settles some intervening matter relating to the cause. Moza v. Ins. Co., 22 How. Prac. (N. Y.) 62. An interlocutory order is one which is made pending the cause and before a final hearing on the merits. Interlocu-

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tory means intervening, happening, accruing, or imposed between the commencement and determination of proceedings.

The test of whether an order is interlocutory is dependent upon the question of whether the party instituting the proceeding or suit in which the order is made began an independent proceeding, rather than move in the pending criminal prosecution, and did it seek a right independent of the criminal prosecution? As stated when this appellant proceeded to obtain the return of its books and papers, it based its application upon the right of protection of the Fourth Amendment of the Constitution, which right was violated by the officers in the seizure. It did not move in the action. All the proceedings are entitled as in an independent proceeding. The impounding order itself was so entitled as a special proceeding. The test is, what determined the character of the proceeding instituted for the return of the books upon which the order of denial was entered? The nature of any order, as a decree or final order, or as not final, depends entirely upon the effect produced by adjudication upon the rights and interests of parties. The usual distinction between interlocutory and other orders, depending on the stage of the cause on which they are made, is not the test for appellate purposes. The present appellant is the only one of the defendants named in the indictment who applied for the return of the books.

In Perlman v. United States, supra, in dealing with the appealability of the order there in question, the court said:

> "The second contention of the government is somewhat strange: that is, that the order granted upon its solicitation was not final as to Perlman, but interlocutory in a proceeding not yet brought, and depending upon it to be brought. In other words, that Perlman was powerless to avert the mischief of the order, but must accept its incidence, and seek a remedy at some other time and in some other way. We are unable to concur."

Assuming, in the present case, that at some time the indictment as to the petitioner was dismissed, and the prosecution continued as against the other defendants, the present order, which is held not to be appealable, would be res adjudicata as to any further effort made by this petitioner for the return of its books. Nor is it an answer to say that the illegal seizure of the books and property can be taken advantage of upon the trial by objecting and successfully excluding them from evidence. The petitioner always has this protection, irrespective of its success or nonsuccess by this appeal, under the fifth amendment of the Constitution, which would forbid the use of books and property obtained by unlawful seizure being used against it upon the trial. It is not the rights of the petitioner alone that must be protected, but the interests of the government are equally as important to protect under this amendment. It may well be that the prosecution, entirely independent of these books, could secure a conviction under the indictment, and, if the book and papers were admitted, the admission of them in evidence must result in a reversal of the conviction. The result would be that on the trial of the indictment only one of the parties could be successful. The defendants there, even with this evidence admitted, still have a chance of acquittal, and, if found guilty,

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the conviction must be reversed, for the government could not sustain a conviction based on this evidence. Nor are the authorities relied upon by the government in conflict with this view.

In Alexander v. United States, 201 U. S. 117, 26 Sup. Ct. 356, 50 L. Ed. 686, an order was entered upon a proceeding in contempt and it was held to be interlocutory. There a witness refused to answer questions or produce books for the examiner on the ground of immateriality. In pleading this privilege under the Fifth Amendment, the court held that while such an order made left the witness no alternative except to obey or be punished for contempt, it was interlocutory in the principal suit, and not a final order, for it did not constitute an independent proceeding amounting to a final judgment, and consequently held that an appeal did not lie therefrom to the Supreme Court. But the court said that if the witness refused to obey, and the District Court went further and punished for contempt, there would then be a right of review, as this would be a final order, saying:

"I have no doubt that a judgment adverse to the witnesses in that proceeding or case will be a final decision, and will be subject to review by a writ of error, but not by appeal."

In Wise v. Mills, 220 U. S. 549, 31 Sup. Ct. 597, 55 L. Ed. 579, the court held that the fact that a question under the Constitution is involved, and an order requiring the production of books and papers does not establish that a constitutional question is involved in the order committing for contempt for refusing to comply with the order to produce, and held that the Supreme Court had not jurisdiction to review a judgment committing for contempt for failure to produce simply because the interlocutory order which the appellant refused to obey involved a constitutional question, and where it does not appear that the order disobeyed was so far de hors the authority of the court as to be avoided.

That proceeding was instituted in an action to punish the United States attorney for failure to turn over the books which were ordered returned after an improper seizure. What the court decided in that case seems to be embraced in the following quotation from the opinion:

"That is to say, we are of opinion that the contention upon which the asserted right to prosecute the error directly to this court was based is so devoid of all foundation as to render it necessary to decline to assume a jurisdiction which we have not, and therefore the writ of error is dismissed."

The previous proceeding for the return of the books which the United States attorney refused to obey was made upon a petition in the criminal prosecution, and was not an independent proceeding as here. The case of Penn. R. Co. v. International Coal Mining Co., 156 Fed. 765, 84 C. C. A. 421, and Crooker v. Knudsen, 232 Fed. 857, 147 C. C. A. 51, were both proceedings in the action, and were held to be interlocutory and not final. With this situation, the books which have been unlawfully seized are now in the possession of the government officers, with no way for their return except possibly, upon a new application, the District Judge may grant the relief which this court denies to the appellant, because the order is not appealable. Therefore books in the possession of the government attorney, which he cannot use upon the trial, and which he cannot or should not use in adducing

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evidence against the defendants, for under the law the petitioner is entitled to their return, and this includes all the privacy that ownership of such property carries with it.

For these reasons the order appealed from should be reversed.

(259 Fed. 856)

ALIOTO et al. v. PEDERSEN.

(Circuit Court of Appeals, Ninth Circuit. August 4, 1919.)

No. 3320.

DAMAGES ⚷78(4)—CONSTRUCTION OF STIPULATION—LIQUIDATED DAMAGES OR PENALTY.

In a contract by which respondent agreed to receive and pay for at least 1,200 salmon from each libelant every 24 hours, a provision that, in case of detention of a boat from delivering for six hours after arrival, the boat should be credited with 25 per cent. additional salmon, and given an equal credit for each hour's further delay, *held* a stipulation for a penalty and not for liquidated damages.

Appeal from the District Court of the United States for the First Division of the Northern District of California; Maurice T. Dooling, Judge.

Suit in admiralty by Frank Alioto and others against L. A. Pedersen. Decree for respondent, and libelants appeal. Affirmed.

This is an appeal by libelants from a decree sustaining exceptions to a libel. The libel sets forth that appellants were hired by the appellee in San Francisco as seamen and fishermen on a voyage to Alaska to catch salmon; that appellee agreed to pay each of the appellants 3¼ cents for each red or coho salmon offered for delivery at a certain place in Alaska; that the shipping articles contained the following clause: "Each Bristol Bay cannery shall employ no less than three beachmen for every line of canning machinery for tall cans operated;" that appellee had eight lines of canning machinery, and at no time employed more than 17 men; that his canning machinery was defective, in that it was constantly getting out of order, and for that reason he was unable to take more than 1,200 salmon per day from each of appellants; that if appellee had had proper machinery and a sufficient number of beachmen he would have been able to take 1,500 salmon a day for 30 days, and each of libelants would have earned $292.50 under the contract; that the contract of hiring also contained the following clause: "If any boat is detained from delivering salmon at receiving station for six hours after arrival, such boat shall be credited with twenty-five per cent. additional salmon over and above the number delivered from it, and for each further hour's delay an additional credit of twenty-five per cent. shall be given. Boats to report at time of arrival at receiving station. The same rule to apply when boats are on the limit. Boats must have nets cleared before arriving at fish receiving station." It is alleged that the limit mentioned is an obligation on the part of appellee to pay for at least 1,200 salmon every twenty-four hours, whether he took the same or not. A further provision in the contract of hiring is as follows: "All salmon must be in perfect condition, and not discolored on the outside, and must be discharged from boats at least once in twenty-four hours." It is set forth that, while appellants were in their boats with undischarged salmon, they were compelled to stay there, and unable to attend to their wants, and that that was one of the reasons why that matter was inserted in the contract, as also to prevent fish which were caught from becoming spoiled by reason of their not being canned in proper time.

Libelants allege that on July 5, 1918, they each tendered to appellee, 1,200 red or coho salmon, within the terms of their contract, and that appellee, by

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reason of lack of beachmen and defective machinery, failed to take them for 24 hours; that the boats were not discharged on July 5th, but on July 6th; that each libelant became entitled to receive credit for 5,700 red or coho salmon, or $146.24, but that appellee credited each with 1,200 salmon, and refused to make further credit; that it is impractical or extremely difficult to fix actual damages by reason of the failure of appellee to take the salmon tendered on July 5th; that a reasonable compensation under the contract depended upon appellee taking all salmon caught, and that expectation that he would do so was the principal inducement for entering into the contract.

H. W. Hutton, of San Francisco, Cal., for appellants.

Pillsbury, Madison & Sutro and A. E. Roth, all of San Francisco, Cal., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). The libel does not allege that the libelants caught and tendered to the appellee at any time any more than 1,200 fish per day. Our construction of the allegations is that the appellee, under the terms of the contract, had a right to limit the number of salmon that he was bound to pay for to 1,200 in each 24 hours. Having the power so to limit the number of salmon which appellee was obliged to accept, that he could not receive more, or that appellants could have caught more to deliver, became immaterial. There is no averment that the appellee did not accept and pay for 1,200 fish in each 24 hours; on the contrary, it is alleged that he did take at least 1,200 per day. If the contract had provided that the appellee would take all the fish that were caught, the question for decision would be different, but the pleader seems to have purposely avoided making such an averment. The allegation that the principal inducement to libelants for entering into the contract was that appellee would take all the red or coho salmon that each of the libelants caught is not material, in view of the averment that but 1,200 were tendered and were taken.

Upon the second cause of action libelants seek to recover because they were prevented from delivering fish by reason of the failure of appellee to unload boats for a period of 24 hours. The contention is that each fisherman became entitled to a credit of 5,700 salmon. This number is arrived at by adding 25 per cent. additional to the 1,200 which were offered for the first six hours of the day, and an additional 25 per cent. for each hour's delay thereafter. Libelants argue that under the terms of the contract the amount to be paid is liquidated damages because of the failure to take the fish offered on July 5th. In our opinion the parties intended by the language used to provide for a penalty and not for stipulated damages. The contract fixes the amount each of the libelants could earn during the time they were delayed, namely, pay for 1,200 fish. If they should be allowed to recover under the construction which they ask the court to put upon the terms of the contract, obviously there would be an unconscionable disproportion between the amount claimed and the actual damages suffered; that is, the amount of recovery would be more than four times the amount which the appellants could have recovered if they had worked. That our construction of the contract is correct is also shown, we think, by the terms, which

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make a distinction between the first six hours' delay and subsequent time. Subsequent time is placed upon a different basis from the first six hours. If no penalty was intended, it is very reasonable to think that the parties would have made no difference between the first six hours and subsequent hours of delay. Furthermore, the provision in the contract that the rule shall apply when the boats are on the limit, indicates that the parties intended a penalty and not liquidated damages. Appellee being obliged to pay for at least 1,200 fish every 24 hours when the boats were on the limit, the men could suffer no damage by delay in taking the fish, and therefore the provision for extra credit became a penalty and not a measure of liquidated damages. Appellants endeavor to overcome this point by the argument that the men were obliged to discharge their boats once a day and to deliver salmon in good condition. But if they were prevented from delivering once a day, or from delivering fish in good condition by reason of the delay of the appellee, they would be excused from complying with such conditions, and would have been entitled to their limit, notwithstanding their failure to comply therewith. In Blewett v. Front Steet Ry. Co., 51 Fed. 625, 2 C. C. A. 415, this court, in considering the language of a bond, held that the omission to declare a sum to be deemed liquidated damages in case of breach, while a circumstance, was not a controlling consideration, in construing the bond, and that the court would construe the penalty as liquidated damages in cases where the parties may not have so nominated. The court said: "The construction will depend upon the intention of the parties, to be ascertained from the whole tenor and subject of the agreement." Here the contract is silent as to whether there shall be stipulated or liquidated damages, and this may be a circumstance of consideration in construing the contract. McCall v. Deuchler, 174 Fed. 133, 98 C. C. A. 169; Terra Cotta Co. v. Caldwell, 234 Fed. 491, 148 C. C. A. 257.

Our conclusion being that the District Court was right in sustaining the exceptions to the libel, the decree is affirmed.

Affirmed.

(259 Fed. 858)

BROWN v. PULLEN.

(Circuit Court of Appeals, Ninth Circuit. May 5, 1919.)

No. 3201.

TRIAL ⟹253(5)—INSTRUCTIONS—IGNORING ISSUES.

The complaint alleging work for a time under employment at a certain wage, a certain payment, and a certain balance due; and answer denying such wage was stipulated, and alleging agreement was for a certain lower wage, and that plaintiff has been paid in full, an instruction that it is either $60 a month—the contract alleged by plaintiff and denied by defendant—or nothing is erroneous, as taking from the jury the question whether plaintiff had been paid the wages at the rate alleged by defendant to have been stipulated, exceeding the amount alleged in the complaint to have been paid.

In Error to the District Court of the United States for the First Division of the District of Alaska; Robert W. Jennings, Judge.

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Action by Tom Brown against Harriet S. Pullen. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

J. H. Cobb, of Juneau, Alaska, for plaintiff in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The plaintiff in error brought an action against the defendant in error to recover a balance of wages, alleging that on December 3, 1915, he was employed by the defendant in error to work at $60 per month, and at that rate worked for her until June 4, 1916, and that from that date until June 11, 1917, he worked for her at the agreed wages of $65 per month; that he had been paid $288, and that there was a balance due him of $869, for which judgment was demanded. The answer denied that the stipulated wages were $60 per month and $65 per month, and alleged that the wages agreed upon were $1 per day for the entire period. The answer further alleged that the plaintiff in error had been paid in full by payments made from time to time, and that on June 13, 1917, defendant in error settled with him, and that he accepted her last payment in full satisfaction of all claims against her. This was denied in the reply.

The court instructed the jury:

"It is either $60 a month, or it is nothing. It is the contract which he alleges, and the contract which she denies, that he relies on, and you cannot split the difference. You cannot do anything of that kind. It is $60 a month, or it is not $60 a month. If it is not $60 a month, then the plaintiff cannot recover."

This instruction was excepted to, and is assigned as error. The instruction was error. It took from the jury the question whether or not the plaintiff in error, even if he contracted to work at $1 per day, had been paid. If he was working at $1 per day, and had been paid but $288, as he alleged and testified, there was still a balance due him of $276. The defendant in error testified that she had paid him this balance. He denied it, and he was entitled to the verdict of the jury on the issue thus presented.

The judgment is reversed, and the cause is remanded for a new trial.

(259 Fed. 859)

WILLIAMS et al. v. KAUFMANN.

(Circuit Court of Appeals, Ninth Circuit. August 4, 1919.)

No. 3280.

PATENTS ⟹328—VALIDITY AND INFRINGEMENT—AUTOMOBILE SPOTLIGHT.

The Kaufmann patent, No. 1,235,809, for an electric lamp fixture especially for use in automobile spotlights, *held* not anticipated, and to cover a true combination, which involved invention; also *held* infringed.

Appeal from the District Court of the United States for the Southern Division of the Southern District of California; Oscar A. Trippet, Judge.

Suit by Charles F. L. Kaufmann, as prochein ami for Walter L. Kaufmann, against Albert C. Williams and Ralph E. Williams, doing

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business under the firm name of Williams Manufacturing Company. Decree for complainant, and defendants appeal. Affirmed.

Westall & Wallace, of Los Angeles, Cal., for appellants.

Frederick S. Lyon and Leonard S. Lyon, both of Los Angeles, Cal., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. This appeal is from an interlocutory decree adjudging letters patent No. 1,235,809, to W. L. Kaufmann (August 7, 1917), valid, and that appellants infringed upon the single claim of the patent.

The defenses are want of invention and noninfringement. The patent pertains to electric lamp fixtures especially for use in automobile spotlights. The claim is as follows:

"A device of the character described, embodying a supporting bracket having a sleeve, a reflector connected detachably with one end of said sleeve, a tube slidable through said sleeve and projectable into said reflector, a lamp within the reflector having a plug fitted within the corresponding end of said tube, the tube having a slot at its other end, a plug of insulating material fitted in the last mentioned end of the tube and having a lug movable in the said slot for holding the second mentioned plug in place, means within the tube for connecting said plugs electrically, conductors connected to the second mentioned plug, and a cap fitted upon the second mentioned end of the tube and covering the slot therein, the cap having a central aperture through which said conductors extend and having a contracted portion adjacent to said apertures threadedly receiving the second mentioned plug, said cap serving as a handle for manipulating the second mentioned plug and said tube."

The appellants state the principal question to be whether or not the claim sued on is valid in view of the prior art, and argue that the claim comprises no true combination, but only an aggregation of mechanical means and expedients well known and long used in the art.

The Kaufmann lamp includes a bracket member adapted to be horizontally rotated. This bracket member carries at its upper end a horizontal sleeve, and upon the fore end of the sleeve there is a lamp reflector, which is detachably connected. The sleeve receives a tube member, and in turn the tube member receives at one end a globe and at the other end a switch plug. The tube slides in the sleeve, and the globe may be adjusted axially within the lamp reflector to focus the beam of light. Over the switch plug, at the opposite end of the tube, a cap member is fitted. Electrical connecting means extend through the tube between the globe and the switch plug. The switch plug carries a lug adapted to fit in a bayonet slot formed in the tube, and by turning the cap member the switch can be turned to make or break the electrical circuit supplying the current to the globe. The lamp includes a cover for the bayonet slot; the covering of the bayonet slot being one of the novel and valuable features provided by the Kaufmann lamp. In the Kaufmann lamp the cap constitutes the means for operating the switch plug to turn off or on the light, acts as a grip for the operator who desires to revolve the lamp, and

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is the thing grasped by the operator to slide the tube within the sleeve to adjust the focus of the lamp. A drawing of the patent is annexed hereto.

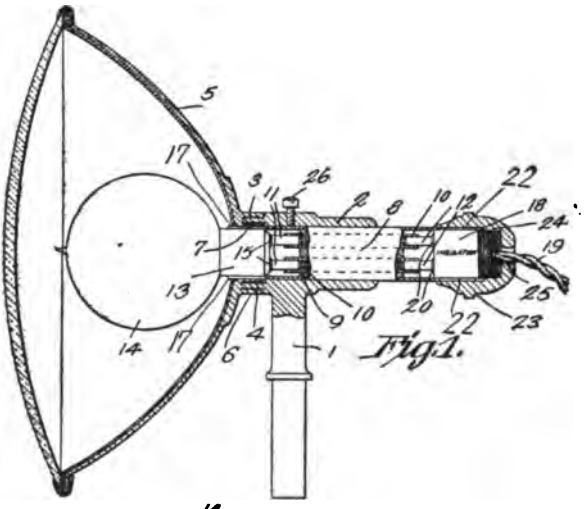

Fig. 1.

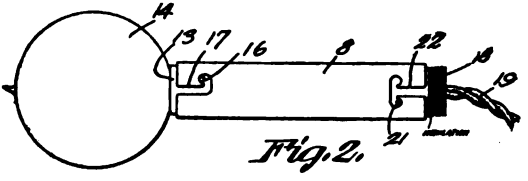

Fig. 2.

In the specifications of the Kaufmann patent the inventor, after describing the cap as fitting slidably upon the outer end portion of the tube to cover the slots and lugs, says:

"The cap *23* has a central restricted aperture *25* through which the cord *19* extends. The cap *23* is constructed of brass or other suitable metal, and provides a handle for manipulating the plug *18* and also covers the slots *22*. The cap *23* also provides a handle for sliding the tube *8* in the sleeve *2*, whereby the lamp *14* can be focused within the reflector *5*, or adjusted axially of the reflector."

The advantage of this mode of operation is evidently in the fact that the operator need only perform the single act of taking hold of the cap when he desires to operate the lamp. This mode of operation appears to be novel; but one move of the operator's arm is required. Compactness is also obtained.

In the prior art spotlights had certain elements exposed in such a way that the action of the lamp was subject to interference by dust or rain. Kaufmann arranged the elements of a spotlight so that all of the elements were protected, and it was novelty in combination with other features of his lamp to cover the slot. In using the cap of the switch plug as a means of adjusting the focus of the lamp, and in making the cap of the spotlight the control feature for turning

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the lamp, adjusting the focus, and rotating the lamp, Kaufmann departs from the mode of operation of the lamps of the prior art.

Appellants refer to the Knauff patent, No. 1,021,195 (March 26, 1912), wherein there is a socket for an electric lamp. But there is shown in the patent merely a switch plug provided with a lug to be received in a bayonet slot similar to the plug, lug, and slot of the Kaufmann spotlight. Knauff, however, does not disclose how to combine the elements with the other elements of the Kaufmann lamp to form a spotlight similar to Kaufmann's.

In the Christian patent, No. 1,054,746 (March 4, 1913), for an improvement in a lamp socket, the device shown contains no bracket, no reflector detachably connected with a sleeve, no cap fitted upon a tube, and no switch element of any kind. It has the admittedly old elements of a bayonet connection and a form of electrical connection.

The Mazzeo patent, No. 1,088,830 (March 20, 1913), has closer relation to Kaufmann's patent than any introduced. Mazzeo invented an improvement in a lamp particularly designed for use as an automobile headlight. Mazzeo shows a complete housing for his lamp, which would make it very difficult for use as a spotlight. He did not arrange the switch member on the lamp, nor did he have a handle to turn the lamp, nor a cap for sliding the tube to adjust the lamp focus, as arranged in the Kaufmann patent. There is no cap which may be grasped to do the threefold function of switching on and off the current, revolving the lamp itself, and focusing the globe. But fundamentally the difference between the Mazzeo and Kaufmann patents lies in the housing of the Mazzeo lamp in such a way that it could not be used as a spotlight. Mazzeo never had the idea of having an uncovered means conveniently at the operator's hand for sliding the tube to adjust the focus of the globe, for the drawings show that the tube of the Mazzeo lamp is held rigidly in one place by the screw *8* of the lamp, and that the screw must be set before the housing reflector is positioned. Kaufmann has so interrelated the elements that the focus member is exposed and ready for operation. Robinson on Patents, vol. 1, § 291. The device is a commercial success and is in extensive use.

We do not think it necessary to refer specifically to other patents introduced to show the prior art, as none shows the combination of Kaufmann.

It is contended that the metal part of the plug on one of the exhibits (No. 3, alleged infringing lamp) is not the equivalent of a cap, because it does not perform the principal function of the cap, and it does not constitute substantially the same means, nor operate in substantially the same manner. But an examination of the devices in evidence and the drawings discloses that the plug of the Kaufmann patent and the plug of Exhibit 3 are identical. The plugs in the respective devices perform the same function and operate in the same manner. Each carries a lug to operate in the bayonet slot of the respective sleeves, and each is received within the sleeve. Each has a threaded portion upon which the metal cap is mounted, and each constitutes the switch for making and breaking the electrical current for the lamp. It is true that the cap in Exhibit 3 does not cover the

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slot, as does the cap of the Kaufmann device; but the spotlight of Exhibit 3, the defendant's lamp, operates in exactly the same manner as does the spotlight of the Kaufmann patent, the cap in the defendant's device merely having a reduced portion for receiving the threaded plug. The shank of the cap in the Kaufmann lamp extends over the sleeve to cover the bayonet slot, while appellants have extended the sleeve to cover the bayonet slot; but this variation is an insignificant mechanical change without varying the mode of operation with relation to the elements of the Kaufmann lamp.

The advantages and benefits of Kaufmann's invention all appear to have been taken by defendants in their lamp. Seneca Camera Mfg. Co. v. Gundlach-Manhattan Optical Co. (D. C.) 236 Fed. 141; Simplex Window Co. v. Hauser Reversible Window Co., 248 Fed. 919, 161 C. C. A. 37. While it is true that the elements of the Kaufmann combination were old in the art, it is none the less true that the combination shows a unitary structure entitled to be protected as invention, and appellants cannot avoid infringement by transferring from the cap of the Kaufmann spotlight to the sleeve thereof the function of covering the bayonet slot. There is no omission of an element of the combination, but rather a mere formal change, upon which is founded the contention that the literal words of the claim are avoided.

There is no serious denial by the appellants that the spotlight, Exhibit 1, introduced in evidence, infringes the Kaufmann claim: and we hold that the District Court was correct in the conclusion that Exhibit 3 is also an infringement of the Kaufmann claim.

As the record shows that Exhibit 3 was sold by the appellants on February 26, 1918, which was prior to the time of the trial of the cause before the District Court, and also that there was a sale between August 7 and September 6, 1917, a prima facie case was established, and the decree correctly enjoined appellants from continuing to manufacture or sell spotlights of the types of Complainants' Exhibits 1 and 3.

Affirmed.

(259 Fed. 863)

BURNETT et al. v. VAILE-KIMES CO.

(Circuit Court of Appeals, Sixth Circuit. June 3, 1919.)

No. 3251.

PATENTS ⟹328—INFRINGEMENT—FORCE PUMP.

The Kimes patent, No. 1,166,224, for a motor-operated force pump, claim 7, the distinguishing element of which is the permanently open air ports connecting the suction and discharge chambers, terminating in a "nozzle extending into the upper chamber having its end above the bottom wall thereof," *held* not infringed.

Appeal from the District Court of the United States for the Southern District of Ohio; Howard C. Hollister, Judge.

Suit by the Vaile-Kimes Company against Claude E. Burnett, Everett P. Larsh, and the Burnett-Larsh Manufacturing Company. Decree for complainant, and defendants appeal. Reversed.

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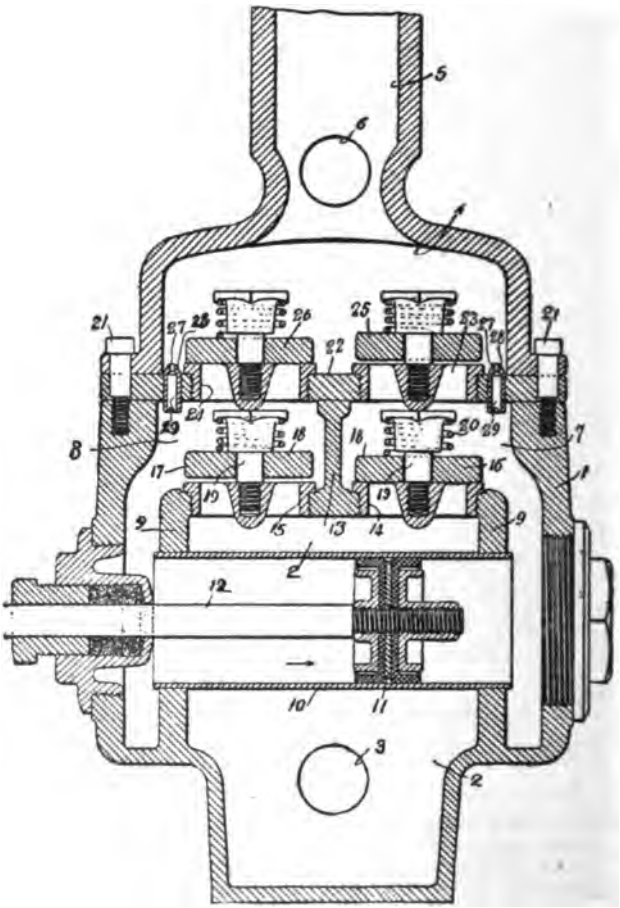
Border Bowman and Paul A. Staley, both of Springfield, Ohio, for appellants.

Wm. R. Wood, of Cincinnati, Ohio, for apppellee.

Before KNAPPEN and DENISON, Circuit Judges, and WALTER EVANS, District Judge.

KNAPPEN, Circuit Judge. Suit for infringement of United States patent No. 1,166,224, issued to plaintiff December 28, 1915, on motor-



operated force pumps for water or other fluid.[1] The features of the device, so far as important here, are sufficiently shown by a reproduction (reduced) of the patent drawing, in which *1* represents the

[1] The bill also embraced a charge of infringement of design patent No. 46,222 to Kimes, August 4, 1914. The District Court held the design patent not infringed. Plaintiff not having appealed, that patent need not be further mentioned.

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pump casing, *2* the inlet chamber, *3* the water supply inlet, *10* the pump cylinder mounted in the partition *9*, which separates the inlet chamber from the valve chambers *7* and *8*, *4* the discharge chamber, separated from the valve chambers *7* and *8* by partition *22*, and provided with an air chamber *5* and a water outlet *6*. In this partition *22* are parts *23* and *24*, respectively controlled by valves *25* and *26* located in the discharge chamber. There are permanently open air passages *27* between the valve chambers and the discharge chamber. The patent drawing shows and the specification describes these passages as in the form of nozzles *28*, having their upper ends tapered, mounted in and extending above the partition *22*, "which constitutes the bottom wall of the discharge chamber."

The only claim in issue is No. *7*, which reads as follows:

"7. In a pump, a cylinder, a piston mounted in said cylinder, a casing having two chambers arranged one above the other, the lower chamber communicating with said cylinder, the upper chamber communicating with a discharge line, a port connecting said chambers, a valve to control said port, and a nozzle extending into said upper chamber, having its end arranged above the bottom wall thereof and having a permanently open passage connecting said chambers."

Upon hearing on pleadings and proofs, the claim was found valid and infringed. From the interlocutory decree awarding injunction and accounting this appeal is taken.

The case here is in narrow compass. The only feature involved relates to what is called the "priming device," consisting of the permanently open air ports *27* between the valve or suction chamber and the discharge chamber. The functions of these ports are (a) to permit the escape of air from the suction chamber to the discharge chamber, and so on to the air pressure chamber, relieving the valves *25* and *26*, and thereby preventing the pump from becoming air-bound; (b) to form a water seal in the discharge chamber, so that air cannot return to the suction chamber; (c) at the same time permitting return of enough water from the discharge to the suction chamber to keep the valves constantly and automatically primed.

Plaintiff seems to have been the first to employ, at least in pumps of this type and in an operative way, constantly open ports between the suction and discharge chambers for the purpose of relieving the pump from a tendency to become air-bound, although it was old to employ open ports between the discharge chamber and the pump cylinders for the purpose of drainage and thus to prevent freezing, and other more or less related uses of similar ports in pumps of different kinds are shown. Plaintiff's permanently open ports through the partition between the suction and discharge chambers are shown to be highly useful, effective, and well-received, and, were the device of the patent plaintiff's first use of such ports in this kind of pumps, the problem before us would be very different.

But that is not the case. The patent in suit was applied for February 25, 1915. More than two years before that date there were in public use and on sale pumps manufactured and sold by plaintiff of

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the general type of those involved here, which were provided with constantly open air ports between the suction and discharge chambers, in the form of lateral perforations in the rim of the discharge valve seat, and thus below the valve and above the floor of the discharge chamber. This construction is identified in the record as the "Stebleton." It is clearly a prior use of the ports there employed. Each of the first six of the eight claims of the patent contains the element "a permanently open port connecting the upper portion of said [suction] chamber with said discharge line," in the foregoing or substantially similar language; but each of them wholly omits the element of "a nozzle extending into said upper chamber, having its end arranged above the bottom wall thereof," or anything of that substance. Each of the six claims thus in terms reads upon the Stebleton structure, and the District Court dismissed the bill as to those six claims.[2] Plaintiff concedes that the eighth claim does not cover that construction; the eighth differing from the seventh principally in describing the nozzle as "having its upper end tapered" and in omitting the phrase "having its end arranged above the bottom wall thereof," although that feature is perhaps implied.

The only question thus relates to the validity and infringement of claim 7, as differentiated from the first six claims. Assuming that claim 7 is valid, we are unable to agree with the learned District Judge that defendant's structure infringes it. That by the language "a nozzle extending into said upper chamber, having its end arranged above the bottom wall thereof," the inventor intended to describe an element not in fact contained in the Stebleton construction is we think clearly apparent, not only from the language of the claim itself and by the omission of that element from each of the six preceding claims, but from the description of the "nozzles" contained in the specification, a quotation from which we print in the margin.[3]

It is unnecessary to invoke the dictionary definition of "nozzle." The description of the ports as "formed in nozzles * * * mounted in the partition," and having "their upper ends extending above said partition" naturally points to a mechanical construction protruding into the discharge chamber and terminating above its floor. The

[2] Plaintiff's counsel say in brief that "the first six claims were not drawn to closely and structurally differentiate from the abandoned Stebleton device, i. e., the horizontal duct in the valve seat, and so were dropped from the infringement issues."

[3] "While a simple opening in the partition is all that is necessary to constitute the relief port, such an opening is more or less liable to stoppage, and, I have in the present construction shown the relief ports 27 as formed in nozzles 28 which are mounted in the partition 22, and have their upper ends extending above said partition, which constitutes the bottom wall of the discharge chamber, and which also have their upper ends tapered. Thus any foreign matter which enters the relief ports must pass directly into the same, as the nozzle affords no support upon which such material may be deposited and may then work its way into the opening. To further prevent clogging it is desirable that the relief port should be as short as it is possible to make it, and I have, therefore, provided the body portions of the nozzles 28 with enlarged bores 29 into which the relief ports open."

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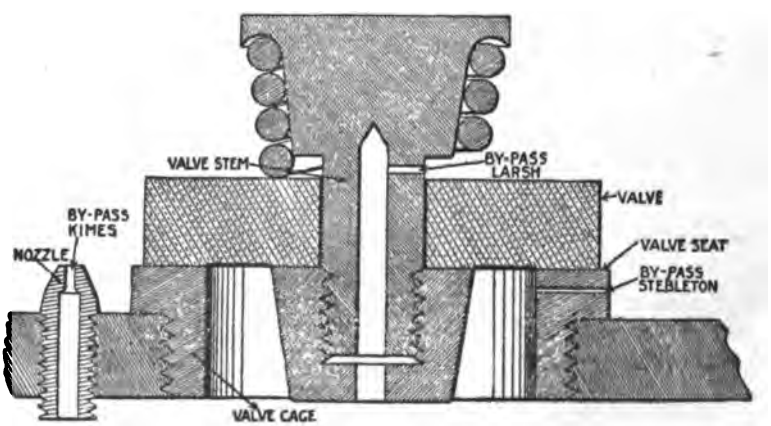
reference to the tapering of the upper ends of the nozzles for the purpose of preventing deposit thereon of material which would tend to clog the opening makes such construction conclusive. We think it clear that plaintiff has intentionally and effectively limited claim 7 to such construction. McClain v. Ortmayer, 141 U. S. 419, 425, 12 Sup. Ct. 76, 35 L. Ed. 800; Cimiotti v. American Co., 198 U. S. 399, 415, 25 Sup. Ct. 697, 49 L. Ed. 1100; Ohmer v. Ohmer (C. C. A. 6) 238 Fed. 182, 193, 151 C. C. A. 258. In fact, the patent drawing above reproduced discloses a mechanical construction extending above the floor of the discharge chamber, and plaintiff's commercial construction has brass nozzles with tapered ends driven through the floor openings and terminating a substantial distance above the floor.

In defendant's pump (which is manufactured under its patent No. 1,242,104, October 2, 1917, and thus later than the patent in suit) the air ports between the suction and discharge chambers take the form of a vertical perforation in the valve stem (thus leading from the suction chamber), connecting near the upper end of the stem with a transverse perforation therein opening into the discharge chamber. These perforations are unlined, and there is neither "nozzle" nor mechanical construction of any kind "extending into" the upper chamber, or "having its end arranged above the bottom wall thereof," unless the mere perforation in the valve stem is such construction, as we think it plainly is not. The advance over Stebleton made by claim 7 is not great, and relates only to the protruding "nozzle" construction. Plaintiff is entitled to but a narrow range of equivalents —a range which cannot reasonably be made to include defendant. If the latter's ports constitute a protruding "nozzle," so also does Stebleton. If, as plaintiff's counsel contend, "the Stebleton valve seat does not extend into the upper chamber, but is a mere window between the upper chamber and the interior of the valve port," the same is in essence true of defendant's port. The subjoined cut shows the form and location of each of the three devices we are considering.



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As readily seen, those of Stebleton and of defendant are within the valve structure, that of plaintiff entirely outside of it. The nozzleless open port of the Stebleton pump cannot be considered merely an abandoned experiment in the sense of the patent law, notwithstanding the stipulation that "plaintiff stopped using, or abandoned the specific construction of the Stebleton exhibit within the two years preceding the application for the patent." [4] The open ports would appear to have been fairly operative and were used in the pumps of plaintiff's manufacture (and even inserted in pumps previously sold, when trouble was had with the suction) for a considerable time, and until the adoption of the improved and superior device of claims 7 and 8.

The conclusion of noninfringement is not weakened by the fact that the specification of defendant's patent states that "vertically opening ports * * * for instance in the deck *8* between the chambers or in some instances in the rim of the discharge valve seat" (apparently referring to Stebleton) have been found objectionable as "quite likely to collect sediment and deposit particularly when adjacent to the bottom of the discharge chamber," and that in defendant's device such difficulties are overcome by locating the port in a "substantially horizontal position * * * elevated above the bottom of the chamber," nor by the fact that defendant's device aims to prevent clogging of the air ports by an asserted wiping action of the valve in its up and down movement on the stem over the air port opening therein.

The question is not whether defendant has infringed Stebleton, nor whether defendant's construction is an improvement over the invention of claim 7 of plaintiff's patent. The only question is: Does it employ the device of that claim? Herman v. Youngstown Co. (C. C. A. 6) 191 Fed. 579, 585, 112 C. C. A. 185. As we have already said, we think it does not. We therefore find it unnecessary to discuss the charge of unfair competition, which does not affect the purely legal question of infringement or noninfringement.

The decree of the District Court is reversed, so far as it finds infringement of, and awards relief respecting, claim 7, and the record is remanded to that court, with directions to enter a new decree not inconsistent with this opinion.

[4] It was formally stipulated upon the hearing below that "the Stebleton pump, with a horizontal orifice through the valve seat rim, was in public use and on sale more than two years prior to February 23, 1915, which is the filing date of the application for that patent."

END OF CASES IN VOL. 170

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See Courts, ⚷312; Patents, ⚷312, 322; Pledges, ⚷42, 44; Principal and Agent, ⚷105; Usury, ⚷102.

I. RIGHT OF ACTION AND DEFENSES.

⚷1 (U.S.C.C.A.Ill.) An accounting may be had based upon a series of transactions between the parties, although they took place under a contract which was void for want of power in one party to make it.—National Trust & Credit Co. v. F. H. Orcutt & Son Co., 630.

Where complainant from time to time assigned accounts receivable to defendant pursuant to a contract void for want of power in defendant to enter into it, but under which complainant received an advance on the accounts received at any one time, and on their collection received back the balance above the advance less certain charges, each of such transactions was separate, and when so closed was settled independently of the others, and not subject to a future accounting.—Id.

ACTION.

II. NATURE AND FORM.

⚷16 (U.S.C.C.A.Pa.) An "action" is a lawful demand of one's right in a court of justice.—Smith-Webster Co. v. John, 511.

III. JOINDER, SPLITTING, CONSOLIDATION, AND SEVERANCE.

⚷40 (U.S.C.C.A.Mich.) In Michigan, it is permissible to join in one declaration a count under the "survival act," on the theory that the person whose death is sued for survived his injuries an appreciable time, and one under the "death act," on the theory that the injury caused immediate death, though the two theories are inconsistent.—Detroit United Ry. v. Weintrobe, 136.

ADJOINING LANDOWNERS.

See Boundaries.

ADMIRALTY.

See Collision; Maritime Liens; Shipping; Towage.

IX. APPEAL.

⚷118 (U.S.C.C.A.Mich.) A decree of the District Court in admiralty, the testimony being taken in open court, should be accepted on an appeal, unless the evidence clearly preponderates against it.—Chicago, D. & G. B. Transit Co. v. Moore, 466.

The hearing of an admiralty appeal in the Circuit Court of Appeals is, in view of the history of such appeals, and prior to the creation of the Circuit Court of Appeals, treated as a hearing de novo.—Id.

On a libel by passengers of a vessel who contracted typhoid fever from drinking water furnished, where the interlocutory decree and order of reference was dated June 28, 1917, and the master's report was dated May 25, 1918, *held* that, where it did not appear that delay resulted from the wrongful act of respondent owner of the vessel, or that the discretion of the trial court had been abused, an award of interest from the date of report only will not be disturbed.—Id.

ADVERSE POSSESSION.

See Bankruptcy, ⚷288.

I. NATURE AND REQUISITES.

(B) Actual Possession.

⚷21 (U.S.C.C.A.Ky.) Continuous cultivation of land every other year for the statutory period, while in alternate years it is used for pasture, but remains inclosed, is sufficient to meet the requirements of adverse possession.—Mosley v. Kentucky Coal Lands Co., 174.

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II. OPERATION AND EFFECT.

(A) Extent of Possession.

⚷100(2) (U.S.C.C.A.Ky.) In Kentucky, where land granted or conveyed is described by irregular boundaries, and not by government subdivisions, the recording of a deed giving color of title is not essential to the extending of the grantee's actual possession constructively to the boundaries named therein.—Mosley v. Kentucky Coal Lands Co., 174.

⚷100(4) (U.S.C.C.A.Ky.) It is the settled rule in Kentucky that, when the alleged disseisor with color has good title to part of his described tract, and none to the remainder, such actual possession as he takes within the limits of his good title will be referred to that title only, and that outside of such limits he can prevail against an adverse title only by depending upon actual possession within the interference or overlap between such adverse title and that part of his own entire claim which is only color and not title.—Mosley v. Kentucky Coal Lands Co., 174.

Boundary of a tract of land as described in the deed *held* sufficiently well defined, under the Kentucky rule, to make a basis for constructive adverse possession of the whole tract by the grantee beyond his actual occupation. —Id.

AFFIDAVITS.

See Perjury, ⚷19, 25, 26.

AGENCY.

See Principal and Agent.

ALASKAN RAILWAY.

See Railroads, ⚷5½.

ALIENS.

See Habeas Corpus, ⚷25.

II. EXCLUSION OR EXPULSION.

⚷18 (U.S.C.C.A.N.Y.) The right of Congress to exclude or expel aliens, or any class of aliens, absolutely or upon conditions, in war or in peace, is an inherent and inalienable right of every sovereign and independent nation, which may be exercised entirely through executive officers.—Lopez v. Howe, 377.

⚷32(9) (U.S.C.C.A.Cal.) A Chinese exclusion hearing before immigration officers, which resulted in excluding a Chinese woman and her children upon ground that her husband had not satisfactorily established his status as a merchant, instead of a laundryman, *held* not to show abuse of discretion or denial of fair hearing.—Yee Won v. White, 86.

⚷32(13) (U.S.C.C.A.Cal.) Immigration officers have exclusive jurisdiction over Chinese exclusion cases, providing they give the applicant a fair hearing and do not abuse their discretion.—Yee Won v. White, 86.

⚷32(13) (U.S.C.C.A.Cal.) Where a Chinaman was excluded after a fair hearing before the Commissioner of Immigration, and officers of that department did not abuse their discretion, the courts have no jurisdiction to review the proceedings.—Louie Share Gan v. White, 92.

An order by Commissioner of Immigration, excluding a Chinaman on ground that his relationship to certain Chinaman in United States had not been established, is not subject to court review because partly based on difference in height between applicant and his alleged twin brother, where other discrepancies also indicated that evidence of relationship was unsatisfactory.—Id.

III. IMMIGRATION.

⚷53 (U.S.C.C.A.N.Y.) A Spanish alien, who believes and teaches anarchy as a philosophical theory, but does not advocate violence, is liable to deportation under Immigration Act Feb. 5, 1917, notwithstanding that he had been a resident in the United States for 15 years.—Lopez v. Howe, 377.

⚷54 (U.S.C.C.A.N.Y.) To successfully attack an order for the deportation of an alien, under Immigration Act Feb. 5, 1917, it must be shown that the proceedings upon which the order is based were unfair, or that the alien has been denied a fair hearing, or that there has been an abuse of discretion on the part of the executive officers of the United States.—Lopez v. Howe, 377.

ANARCHISTS.

See Aliens, ⚷53.

ANTI-TRUST LAW.

See Monopolies, ⚷12–31.

APPEAL AND ERROR.

See Courts, ⚷356, 366, 403; Criminal Law, ⚷1023–1186.

For review of rulings in particular actions or proceedings, see also the various specific topics.

III. DECISIONS REVIEWABLE.

(E) Nature, Scope, and Effect of Decision.

⚷107 (U.S.C.C.A.N.Y.) Where an action at law is by consent referred to a referee "to hear and determine" in accordance with the New York statute, it is the practice of the federal court to make an order for judgment on the referee's report, but such order is pro forma only, and the fact that the judgment is entered by the clerk without an order does not deprive the defeated party of the right to have the same reviewed on error.—Steger v. Orth, 73.

V. PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW.

(B) Objections and Motions, and Rulings Thereon.

⚷181 (U.S.C.C.A.Cal.) An objection not raised below, nor assigned as error on appeal, will not be considered.—Louie Share Gan v. White, 92.

⚷204(2) (U.S.C.C.A.N.Y.) Where no objection was offered, exception taken, or motion to strike out made, it cannot be urged upon appeal that certain evidence was inadmissible because

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hearsay.—Central R. Co. of New Jersey v. Sharkey, 212.

⚷231(5) (U.S.C.C.A.Ky.) A general objection and exception to testimony as immaterial and irrelevant is not a sufficient basis for an assignment of error on the ground that it was incompetent as hearsay.—Mineral Development Co. v. Kentucky Coal Lands Co., 186.

⚷237(2) (U.S.C.C.A.Mich.) In an action against an electric company for death of an employé of a contractor, who in the course of his work on building being constructed came in contact with a high tension wire and was killed, error in the tentative admission of evidence that the contractor had insured the lives of his employés, including deceased, and that a claim had been filed under the Michigan Workmen's Compensation Act and suspended, was waived in appellate court, where there was no motion to strike such testimony and no instruction was requested that it be disregarded.—Curcuru v. Peninsular Electric Light Co., 79.

⚷237(2) (U.S.C.C.A.N.Y.) Where no motion to strike was taken to evidence admitted without objection, it cannot be urged on appeal that evidence was inadmissible as hearsay.—Central R. Co. of New Jersey v. Sharkey, 212.

(C) Exceptions.

⚷264 (U.S.C.C.A.Mich.) In an action for death in Michigan, if there was a mistrial, in that the verdict being general, there is no showing on which of two inconsistent theories plaintiff's recovery rested, whether on the theory of recovery under the survival or under the death act, it calls for no action by the Circuit Court of Appeals, in the absence of exception or assignment directed to the point.—Detroit United Ry. v. Weintrobe, 136.

⚷272(2) (U.S.C.C.A.N.Y.) An exception to the refusal to grant a requested instruction, taken after the jury had retired, presents no question for review.—Central R. Co. of New Jersey v. Sharkey, 212.

⚷273(4) (U.S.C.C.A.Ky.) A general objection and exception to testimony as immaterial and irrelevant is not a sufficient basis for an assignment of error on the ground that it was incompetent as hearsay.—Mineral Development Co. v. Kentucky Coal Lands Co., 186.

XI. ASSIGNMENT OF ERRORS.

⚷719(1) (U.S.C.C.A.Cal.) An objection not assigned as error on appeal will not be considered.—Louie Share Gan v. White, 92.

⚷719(8) (U.S.C.C.A.Mich.) In an action for death in Michigan, if there was a mistrial, in that, the verdict being general, there is no showing on which of two inconsistent theories plaintiff's recovery rested, whether on the theory of recovery under the survival or under the death act, it calls for no action by the Circuit Court of Appeals, in the absence of exception or assignment directed to the point.—Detroit United Ry. v. Weintrobe, 136.

XVI. REVIEW.

(A) Scope and Extent in General.

⚷837(6) (U.S.C.C.A.Ky.) In reviewing an instruction the record must be considered as it was at the time of the charge to the jury, and it is immaterial to consider whether the court was right when it received evidence or right when it later struck it out.—Mineral Development Co. v. Kentucky Coal Lands Co., 186.

⚷843(1) (U.S.C.C.A.Mass.) That plaintiff's right to an injunction expired pendente lite does not relieve court from duty of determining substantial issues existing when case is argued upon appeal.—Standard Fashion Co. v. Magrane Houston Co., 593.

⚷859 (U.S.C.C.A.N.Y.) Findings of fact are not reviewable on writ of error, as only questions of law are open.—Sampliner v. Motion Picture Patents Co., 220.

(G) Questions of Fact, Verdicts, and Findings.

⚷1005(3) (U.S.C.C.A.N.J.) A verdict on conflicting evidence approved by the trial court is conclusive on Court of Appeals.—Philadelphia & R. Ry. Co. v. McKibbin, 452.

⚷1008(2) (U.S.C.C.A.Mass.) Where actions at law were tried to the court, jury being waived, findings of the court cannot be reversed on error, unless they are clearly wrong, because not sustained by any view of the evidence, or were induced by mistaken view of the law.—Watchmaker v. Barnes, 583.

⚷1008(3) (U.S.C.C.A.R.I.) Where the case turned on admitted facts, the inferences therefrom, and on the interpretation of written evidence, the usual rule that appellate court will give great consideration to conclusion of trial judge does not apply.—Munro v. Smith, 1.

(H) Harmless Error.

⚷1050(1) (U.S.C.C.A.Mich.) In an action against a railroad for deaths at a crossing, any technical inadmissibility of records purporting to show the rate of earnings of one decedent where he had been employed *held* harmless to the railroad, decedent having been a young and able-bodied man without dispute, while the records only purported to show he had been earning 30 cents an hour.—Detroit United Ry. v. Weintrobe, 132.

⚷1053(4) (U.S.C.C.A.Mich.) In an action against an electric company for the death of an employé of a contractor, who in the course of building operations came in contact with a high tension wire and was killed, the tentative admission of testimony that contractor had insured the lives of his employés pursuant to the Michigan Workmen's Compensation Act was harmless, if erroneous, where the court charged that the fact that the contractor had insured the lives of its employés was not one on which finding could be based.—Curcuru v. Peninsular Electric Light Co., 79.

⚷1060(3) (U.S.C.C.A.Canal Zone) Argument of counsel for a plaintiff to the jury, made with the approval of the court, commenting on the result of a former trial, the poverty of plaintiff, the wealth of defendant, and other matters which could not properly be shown in the case, *held* prejudicial error.—Panama Electric Co. v. Moyers, 287.

(I) Error Waived in Appellate Court.

⚷1178(1) (U.S.C.C.A.Ohio) On a writ of error, an appellate court will direct the entry of the order which should have been made by

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the trial court on the day when it entered the judgment under review; but on appeal in equity there is no such rigid rule, and the appellate court will direct the order which ought to be made as the situation exists after the mandate goes down.—Lindley v. Denver, 151.

ARMY AND NAVY.

See Criminal Law, ⚷315, 371, 812; War, ⚷4.

⚷28 (U.S.C.C.A.S.C.) A "post" or "garrison" is the permanent home of the army in time of peace, where soldiers are given proper training with a view of having them prepared for the intelligent performance of duty in event of conflict.—Hines v. Mikell, 28.

⚷40 (U.S.C.C.A.S.D.) Words alone may constitute the overt act violative of the Espionage Act June 15, 1917, declaring interference or attempted interference with the creation and operation of the armed forces of the country a crime, though words which in their nature under the circumstances could not apparently have such tendency are without the statute; the intent with which they are uttered not alone making them harmful and legally obnoxious.—Wolf v. U. S., 364.

Utterances charged as violations of Espionage Act June 15, 1917, in that by them defendant attempted to cause disloyalty, insubordination, mutiny, and refusal of duty in the military forces of United States, *held* not violative of the statute.—Id.

Utterances charged as violations of Espionage Act June 15, 1917, in that defendant thereby obstructed the recruiting and enlistment service of the United States, *held* not such as could obstruct recruiting and enlistment.—Id.

In construing the sufficiency of a charge of violating Espionage Act June 15, 1917, the court is not concerned with the truth or falsity of the statement alleged to have been made by defendant.—Id.

Indictment charging a violation of Espionage Act June 15, 1917, in that defendant, to obstruct the recruiting and enlistment service, publicly stated the war with Germany was unjust, etc., *held* sufficient; "publicly" meaning in public, well known, open, notorious, common, or general, as opposed to private, secluded, or secret.—Id.

In a prosecution for violation of Espionage Act June 15, 1917, by utterances calculated to obstruct the recruiting and enlistment service, evidence *held* insufficient to show that defendant spoke with any intent to obstruct the service.—Id.

In a prosecution for violation of Espionage Act June 15, 1917, by utterances calculated to obstruct enlistment and recruiting and to cause mutiny, or refusal of duty, in the military forces of United States, evidence concerning a certain flag incident, and serving to explain the circumstances under which defendant's statement covered by certain counts of the indictment was made, and to show that it was merely an angry, resentful outburst, *held* admissible under such counts.—Id.

In a prosecution for violation of Espionage Act June 15, 1917, testimony by defendant that he had not advised his sons to enlist *held* inadmissible, in the absence of attempt by the government to prove for any purpose that defendant had so advised his sons.—Id.

ARREST.

See Criminal Law, ⚷829.

ASSIGNMENTS.

See Account, ⚷1; Pledges, ⚷42, 44; Principal and Agent, ⚷105.

ASSOCIATIONS.

See Internal Revenue, ⚷19.

ASSUMPTION OF RISK.

See Master and Servant, ⚷204–226.

ATTORNEY AND CLIENT.

See Appeal and Error, ⚷1060; Courts, ⚷359; Criminal Law, ⚷723, 1178; Estoppel, ⚷79; Judgment, ⚷521, 675.

II. RETAINER AND AUTHORITY.

⚷77 (U.S.C.C.A.Okl.) One who seduces an agent to betray his principal, or an attorney his client, can hold none of the fruits of his bargain.—Barnett v. Kunkel, 370.

IV. COMPENSATION AND LIEN OF ATTORNEY.

(A) Fees and Other Remuneration.

⚷135 (U.S.C.C.A.Mass.) Attorneys for a bankrupt, who rendered services in connection with the condemnation by the United States of property standing in the name of the bankrupt, which property, however, was incumbered, and to which other creditors asserted claims, held on the peculiar facts in this case, entitled to compensation for their services; the attorneys and all parties having agreed that the government should receive the property on payment of the value as fixed by the jury without payment of costs and disbursements, payment of which the attorneys might have insisted upon under Rev. Laws Mass. c. 1, § 7, which was made applicable by Act Aug. 18, 1890 (Comp. St. § 6911).—Turner v. Woodard, 537.

(B) Lien.

⚷175 (U.S.C.C.A.Mass.) Rev. Laws Mass. c. 165, § 48, giving an attorney who had prosecuted a suit to final judgment a lien thereon for the amount of his fees and disbursements, covers only attorney's fees allowed in the bill of costs, thus distinguishing attorney's fees from counsel fees.—Turner v. Woodard, 537.

Attorneys for a bankrupt, who rendered services in connection with the condemnation by the United States of property, title to which stood in the bankrupt's name, both before and after bankruptcy, and whose services resulted in the obtaining of a sum considerably greater than that which the government originally offered to pay, *held* not entitled to collect for their services and disbursements on the theory of analogy to the case where one of several persons interested in trust property or a fund brings a suit for its preservation or administra-

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tion, in which case the court will order him to be reimbursed.—Id.

AUTOMOBILES.

See Bankruptcy, ⚷184, 363; Criminal Law, ⚷534; Intoxicating Liquors, ⚷236; Railroads, ⚷307, 350.

BAILMENT.

See Pledges.

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See Attorney and Client, ⚷135, 175; Courts, ⚷342; Eminent Domain, ⚷158; Equity, ⚷66; Estoppel, ⚷79; Insurance, ⚷514; Payment, ⚷39.

II. PETITION, ADJUDICATION, WARRANT, AND CUSTODY OF PROPERTY.

(A) Jurisdiction and Course of Procedure in General.

⚷20(2) (U.S.C.C.A.Ohio) The federal bankruptcy court had power by summary order to compel the state court receiver of an insolvent partnership to turn over money in his possession to the bankruptcy court, to await its action on the question of compensation, fees, and disbursements of the receiver.—In re Diamond's Estate, 138.

The bankruptcy court, having made an adjudication, was not at liberty to surrender its exclusive jurisdiction over property of the bankrupt estate in its actual or constructive possession, and the state court, which had appointed a receiver for the estate, no longer had any power so to dispose of it as to deprive the bankruptcy court of power finally to determine the propriety of the disposition.—Id.

The ultimate determination of the question of the compensation and allowances of a state court receiver *held*, under the facts, to rest with the federal bankruptcy court, which adjudicated that the firm involved was bankrupt, taking into consideration the extent to which the estate had been benefited.—Id.

(D) Warrant and Custody of Property.

⚷101 (U.S.C.C.A.Ohio) From the time petition in bankruptcy was filed the property of the bankrupt estate was constructively in the custody of the law.—In re Diamond's Estate, 138.

⚷101 (U.S.C.C.A.Ohio) Where, when the bankruptcy petition was filed, equipment was in possession of bankrupt company, either as owner or lessee, and all parties interested, including the board of road commissioners, with which the bankrupt had contracted, and on whose work the equipment was to be used, recognized the receiver was in possession and control of the equipment, the jurisdiction of the bankruptcy court attached to the equipment, though it was not situated within the district where the proceedings were begun, and the jurisdiction of other courts, not exercised to ripen into actual holding adverse to the bankrupt was superseded.—Board of Road Com'rs of Monroe County, Mich., v. Keil, 144.

III. ASSIGNMENT, ADMINISTRATION, AND DISTRIBUTION OF BANKRUPT'S ESTATE.

(B) Assignment, and Title, Rights, and Remedies of Trustee in General.

⚷152 (U.S.C.C.A.Ohio) On an adjudication of bankruptcy, the trustee's title to the property and funds of the bankrupts related back to the time of filing the petition for bankruptcy adjudication.—In re Diamond's Estate, 138.

(C) Preferences and Transfers by Bankrupt, and Attachments and Other Liens.

⚷159 (U.S.C.C.A.Mass.) Though bankrupt obtained defendant's money by fraud, yet defendant had a claim against him provable in bankruptcy proceedings, and was a creditor.—Watchmaker v. Barnes, 583.

⚷164 (U.S.C.C.A.Mass.) Where indorsers of notes who had rediscounted them induced the bankrupt to pay the same, the trustee in bankruptcy may recover such payments from the indorsers as preferences within Bankruptcy Act July 1, 1898, § 60 (Comp. St. § 9644), provided the indorsers had reasonable cause to believe, when payments were made, that the bankrupt was insolvent, etc.—Watchmaker v. Barnes, 583.

Where defendant, who discounted a note for the bankrupt, discovered on the following day that an indorsement was forged, and called on the bankrupt to return the money, *held* that where the bankrupt was unable to do this, and defendant accepted a postdated check, which was shortly paid, the transaction was preferential, within Bankruptcy Act July 1, 1898, § 60 (Comp. St. § 9644), and cannot be upheld on the theory that defendant was merely procuring a return of his money, for by accepting a postdated check, which was paid from the bankrupt's general funds, defendant became a general creditor.—Id.

Where a creditor of a bankrupt accepted a postdated check, the transfer of the bankrupt's property occurred, not on delivery of the check, but on payment of the same.—Id.

⚷166(4) (U.S.C.C.A.Mass.) Knowledge that a bankrupt who makes a payment to or on behalf of a creditor has committed forgery is notice of a fact which would incite a person of reasonable prudence to inquiry, and must be deemed notice of all facts which a reasonably diligent inquiry would disclose for the purpose of determining whether the payment was preferential within Bankruptcy Act July 1, 1898, § 60 (Comp. St. § 9644).—Watchmaker v. Barnes, 583.

Under Bankruptcy Act July 1, 1898, § 60, as amended by Act June 25, 1910 (Comp. St. § 9644) it is not a necessary element of a preference that the party receiving a payment from the bankrupt or benefiting thereby should have reasonable cause to believe that a preference was intended.—Id.

⚷184(2) (U.S.C.C.A.Mich.) In view of the contract, whereby petitioner had sold a motor

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truck to a bankrupt, which required petitioner's written consent to any resale that might be made by the bankrupt, Acts Mich. 1915, No. 64, providing that, where the property sold is intended for resale by the contract vendee, the instrument must be recorded like a chattel mortgage to protect the vendor, *held* not to apply to the case.—Smith v. Carukin, 51.

Contract for sale of motor truck to a bankrupt providing for payment in installments, and that title should remain in the seller as his equity appeared from time to time sufficient to secure him, etc., *held* not a passing of title with a reserved lien (that is, a chattel mortgage), so that the instrument required recording under the Michigan rule to protect the seller against the bankrupt's trustee.—Id.

⚷188(1) (U.S.C.C.A.Ill.) Under Bankruptcy Act July 1, 1898, § 47a, as amended by Act June 25, 1910, § 8 (Comp. St. § 9631), the rights of an ancillary receiver are those of an execution creditor, and the priority rights of such creditors as against claims for superior liens must be determined by the laws of the state where the execution is levied.—Hoyt v. Zibell, 254.

⚷210 (U.S.C.C.A.Ohio) On an adjudication of bankruptcy, the District Court acquired an essentially exclusive jurisdiction to administer the estate of the bankrupts generally, including the determination of liens on their property, as well as questions of disbursements and distribution generally.—In re Diamond's Estate, 138.

The property which by bankruptcy adjudication, became subject to the jurisdiction of the District Court to settle adverse claims included that in the court's constructive as well as in its actual possession.—Id.

(D) Administration of Estate.

⚷227 (U.S.C.C.A.Mass.) Under General Order in Bankruptcy No. 17 (89 Fed. viii, 32 C. C. A. xix), it is the duty of a referee, where petition to review his order is filed, to forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon.—Gardner v. Gleason, 555.

⚷255 (U.S.C.C.A.Mass.) Neither the rent reserved in the lease, nor the rent which had been previously paid by the bankrupt as a tenant at will, are conclusive in determining what rental should be allowed the owners during the occupancy of their premises by the receivers; but evidence of the rent which had been previously paid, either under the lease or a verbal letting, may be of great assistance in determining what fairly and equitably ought to be allowed.—Gardner v. Gleason, 555.

Where occupancy by the assignee of a bankrupt was of benefit to the estate, as the business was maintained as a going concern, rent for such occupancy should be allowed as one of the expenses in preserving the estate.—Id.

Where, after bankruptcy, receivers retained possession of the premises in which the bankrupt was carrying on business, for the purpose of disposing of the estate, *held*, that the amount of business transacted by the receivers could not be considered in determining the amount of rent to which the owners of the premises were entitled.—Id.

The decree of the District Court, allowing the owners of property occupied by receivers in bankruptcy, who carried on the bankrupt's business, to recover for the period of occupancy at the same rate of rental as fixed under the lease, *held*, under the circumstances, warranted.—Id.

(E) Actions by or Against Trustee.

⚷288(1) (U.S.C.C.A.Wis.) Surrender to a trustee of property in possession of third persons claiming ownership thereof cannot be enforced by a summary proceeding in the bankruptcy court, over objection of the claimants.—Eisenberg v. Weisskopf, 71.

⚷288(2) (U.S.C.C..A.Ohio) If the state court receiver, when bankruptcy intervened, was holding a particular fund of the estate adversely to the bankrupts or their estate, jurisdiction was lacking in the federal bankruptcy court by summary proceedings to order the receiver to turn the fund over to the trustee in bankruptcy, but there was jurisdiction if the fund was not adversely held.—In re Diamond's Estate, 138.

A state court receiver of an insolvent partnership, when bankruptcy of the firm intervened, held its funds, not in his own right, but merely in an official capacity, and as a hand of the court, not adversely to the bankrupt or his estate, to deprive the bankruptcy court of jurisdiction by summary proceedings to order the fund turned over to the trustee.—Id.

That the state court receiver of an insolvent partnership disbursed a fund under the state court's order did not convert his holding, formerly nonadverse to the partners or their estate, into one of an adversary character depriving the federal bankruptcy court of jurisdiction by summary order to order him to transfer funds to the trustee in bankruptcy, where the receiver at the time knew of the bankruptcy proceedings, and of efforts of the bankruptcy court to prevent disbursement.—Id.

⚷288(3) (U.S.C.C.A.Ohio) Possession of an assignee for the benefit of creditors is not adverse to the bankrupt or his estate.—In re Diamond's Estate, 138.

⚷293(1) (U.S.C.C.A.Ohio) Where a board of road commissioners, for which the bankrupt company had been doing work, acquired from the receiver in bankruptcy possession and use of the bankrupt's equipment, which it would not otherwise have obtained without litigation, and agreed that, when the work was finished, the equipment should be returned to the bankruptcy court, and to deposit a cash fund as security against loss or damage, if the board refused to return the equipment after it became bound to do so, there was a loss or damage subject to be assessed by the bankruptcy court, implying both the right and power of the court to determine when the duty to return might exist.—Board of Road Com'rs of Monroe County, Mich., v. Keil, 144.

⚷293(4) (U.S.C.C.A.Ohio) District Court in bankruptcy *held* without jurisdiction of question of liability of a board of county road commissioners to the bankrupt company, which had been doing road work for the board, and the

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company's trustee in bankruptcy, under certain contracts whereby the board, of whose liability to the bankrupt under the original contract for the work the court had no jurisdiction, submitted to appear before the referee to make concessions to aid him in deciding whether or not to give the receiver certain instructions, or whether to leave the contract and the bankrupt company's property in the board's hands for completion of the work by it.—Board of Road Com'rs of Monroe County, Mich., v. Keil, 144.

⚷296 (U.S.C.C.A.Ohio) A bankrupt's receiver, by going into the state court, which had appointed receiver for the insolvent estate, to ask the court to direct its receiver to turn over funds to the bankruptcy receiver, did not finally elect such remedy, submitting himself to the jurisdiction of the state court, and inviting its adverse order, so as to deprive the federal bankruptcy court of jurisdiction to order transfer of the fund by the state court receiver to the bankruptcy trustee.—In re Diamond's Estate, 138.

Pendency of proceedings in state appellate court for review of state court's action setting aside previous order for compensation of its receiver *held* not to affect the jurisdiction of the federal bankruptcy court to make a summary order that the state court receiver transfer assets to the bankruptcy trustee.—Id.

⚷303(3) (U.S.C.C.A.Mass.) In a suit by trustee in bankruptcy against one who discounted for the bankrupt notes bearing forged indorsements, evidence *held* to show that the payments were preferential within Bankruptcy Act July 1, 1898, § 60 (Comp. St. § 9644); the defendant knowing before payment of the forged indorsements.—Watchmaker v. Barnes, 583.

In action by the trustee in bankruptcy to recover alleged preferential payments, the finding of the trial court that the payments were preferential and were induced by threats on the part of the creditor, after discovery that indorsements on the notes discounted were forgeries, *held* warranted.—Id.

In a suit to recover payments made on notes which defendant had rediscounted, evidence *held* sufficient to show that one of the defendants knew of the fact that indorsements on the notes had been forged, and communicated such fact to his codefendant, and that payments which the bankrupt was induced to make by promise of further credit were preferential.—Id.

(F) Claims Against and Distribution of Estate.

⚷309 (U.S.C.C.A.N.C.) A creditor, who holds a note of a bankrupt firm upon which a partner has, as joint maker, surety, or indorser, made himself individually liable, is entitled to prove his claim against both the partnership and individual estate.—Bank of Reidsville v. Burton, 286.

⚷351 (U.S.C.C.A.N.C.) Where a bankrupt is a partnership, the members or some of the members of which are themselves partnerships, the creditors of such a constituent firm are entitled to have their debts first paid out of its assets before creditors of the bankrupt partnership may participate therein.—Bank of Reidsville v. Burton, 286.

⚷363 (U.S.C.C.A.Mich.) Conditional seller of motor truck to bankrupt, by filing general claim against the bankrupt for the purchase price named in the contract, the indebtedness being claimed only if the seller's petition to reclaim the motor truck failed, *held* not to have elected his remedy as against the general assets of the estate.—Smith v. Carukin, 51.

VI. APPEAL AND REVISION OF PROCEEDINGS.

(A) Superintendence and Revision.

⚷443 (U.S.C.C.A.Ohio) Under Bankruptcy Act 1898, § 24b (Comp. St. § 9608), the Circuit Court of Appeals will entertain petition to revise order of District Court in bankruptcy, overruling objections to its jurisdiction of the parties to and the matter set forth in the petition of a trustee in bankruptcy for instructions to sue the board of county road commissioners, with which the bankrupt had contracted, for the recovery of damages for breach of the board's original contract with the trustee.—Board of Road Com'rs of Monroe County, Mich., v. Keil, 144.

(B) Appeal.

⚷455 (U.S.C.C.A.Ohio) No appeal lies from an order of the District Court in bankruptcy overruling objections to the court's jurisdiction of the parties to and the matter set forth in the petition of a trustee in bankruptcy, asking instructions to sue the board of county road commissioners, with which the bankrupt had contracted, for the recovery of damages for breach of the board's original contract with the trustee; such order not being final.—Board of Road Com'rs of Monroe County, Mich., v. Keil, 144.

⚷467 (U.S.C.C.A.Mass.) On appeal by the trustee in bankruptcy from a decree of the Circuit Court, reversing an order of the referee as to the rent to be paid by the receivers for the use of property of which the bankrupt had possession, *held* that, under the assignments of error and the certification of the question for review by the referee, the only question for determination on appeal was the amount of rent which should be allowed the owners during the occupancy of the receivers, etc.—Gardner v. Gleason, 555.

⚷467 (U.S.C.C.A.Mass.) In a suit by the trustee in bankruptcy to recover an alleged preferential payment, where the circumstances under which the payment was made were set out in the agreed statement of facts, and the parties proceeded in the submission of the facts upon the idea that the court should draw such inferences as were warranted and necessary, the Court of Appeals may dispose of the case by drawing such inferences as are necessary.—Watchmaker v. Barnes, 583.

BANKS AND BANKING.

See Pledges, ⚷42; Principal and Agent, ⚷105.

III. FUNCTIONS AND DEALINGS.

(C) Deposits.

⚷154(9) (U.S.C.C.A.W.Va.) Where defendant bank knew that a special account opened by plaintiff was for the purpose of advancing

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money to meet the pay roll of a contractor, who was constructing a building for plaintiff, and that the custom was for plaintiff, when a pay roll came due, to make a check on the account in favor of the contractor for the exact amount, which was used in meeting the pay roll, it cannot be held as matter of law that the deposit made by such a check was not a special deposit, which defendant would not rightfully apply on a note of the contractors. —Owens Bottle-Mach. Co. v. Kanawha Banking & Trust Co., 638.

BILLS AND NOTES.

See Bankruptcy, ⚷164, 303, 309; Carriers, ⚷55; Courts, ⚷312; Payment, ⚷39; Principal and Agent, ⚷123.

BONDS.

See Counties, ⚷182; Estoppel, ⚷62; Specific Performance, ⚷17; Waters and Water Courses, ⚷230.

BOOKS.

See Criminal Law, ⚷1023.

BOUNDARIES.

See Adverse Possession, ⚷100; Intoxicating Liquors, ⚷236; States, ⚷12.

I. DESCRIPTION.

⚷3(3) (U.S.C.C.A.Ky.) Departure from courses and distances required to yield to a call for an extended natural object should not be greater than is reasonably necessary, and, the distance called for being exhausted, a slight and immaterial variation from the prescribed course, whereby the nearest point in the natural object can be reached, should be made, rather than to follow the course precisely and reach the natural object at a much greater distance.—Rowe v. Kidd, 195.

II. EVIDENCE, ASCERTAINMENT, AND ESTABLISHMENT.

⚷37(1) (U.S.C.C.A.Ky.) A verdict finding the boundary of a grant of land from the state of Kentucky as established by an old survey *held* reached under proper instructions and supported by the evidence.—Mineral Development Co. v. Kentucky Coal Lands Co., 186.

⚷37(3) (U.S.C.C.A.Ky.) Under evidence in suit to remove cloud from title, *held*, that a surveyor's location of the patent, under which defendants claimed, carried out, generally, the intent of the original surveyor, the cardinal object of inquiry.—Rowe v. Kidd, 195.

BOYCOTT.

See Monopolies, ⚷12.

BRIDGES.

See Navigable Waters, ⚷20.

II. REGULATION AND USE FOR TRAVEL.

⚷39(5) (U.S.C.C.A.Wash.) An independent contractor for repairing a city bridge is liable for an injury to a person crossing the bridge, caused by his negligence in leaving it in an unsafe condition.—Oregon-Washington R. & Nav. Co. v. Branham, 517.

BROKERS.

See Courts, ⚷328; Pledges, ⚷42, 44; Principal and Agent, ⚷105.

VI. RIGHTS, POWERS, AND LIABILITIES AS TO THIRD PERSONS.

⚷96 (U.S.C.C.A.Pa.) If buyers, by virtue of stipulation in contract that goods were to be billed by and proceeds collected by plaintiff broker for seller, had paid plaintiff the money due seller for goods delivered, the latter could not thereafter demand it.—Smith-Webster Co. v. John, 511.

⚷106 (U.S.C.C.A.Pa.) Clause in contract that goods were to be billed by and proceeds collected by plaintiff broker for seller did not vest in plaintiff the right in its own right to sue for the purchase price.—Smith-Webster Co. v. John, 511.

CANCELLATION OF INSTRUMENTS.

See Estoppel, ⚷95; Guardian and Ward, ⚷105; Judgment, ⚷521; Patents, ⚷211; Public Lands, ⚷120; Woods and Forests, ⚷8.

CARRIERS.

See Admiralty, ⚷118; Damages, ⚷46, 130, 131, 132, 133; Husband and Wife, ⚷209; Master and Servant, ⚷180; Negligence, ⚷101; Railroads, ⚷5½; Shipping, ⚷166.

I. CONTROL AND REGULATION OF COMMON CARRIERS.

(A) In General.

⚷18(6) (U.S.C.C.A.Ohio) An order granting a preliminary injunction restraining a city from interference with the control, operation, or management of a street railway system by the company or with its collection of fares in accordance with a schedule adopted, but expressly recognizing the right of the city to act through appropriate legislation, *held* justified by threatened executive interference.—City of Toledo v. Toledo Rys. & Light Co., 426.

While a court is without power to affirmatively fix rates of fare to be charged by a street railroad company, it may determine that the enforcement of a rate lower than one proposed would be confiscatory and enjoin the same, and may refuse an injunction, unless the company will accept that rate which the court finds to be reasonable.—Id.

The rule sometimes followed of permitting enforcement of a reduced rate of charge by a public service corporation, as a street railroad company, for a trial period, does not require a trial period for a partial increase, where the unchallenged computations show a larger increase to be necessary.—Id.

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II. CARRIAGE OF GOODS.

(B) Bills of Lading, Shipping Receipts, and Special Contracts.

⚷55 (U.S.C.C.A.Neb.) A notation on a bill of lading for a car of grain, which rendered it nonnegotiable, *held* not invalidated under Act Aug. 29, 1916, § 3 (Comp. St. § 8604b), by a subsequent rebilling of the car in interstate commerce without the knowledge of the legal owner of the grain.—Rainbolt v. Lamson Bros., 508.

⚷59 (U.S.C.C.A.Neb.) A bill of lading for a car of grain, stamped on its face, "Receipt issued for this bill of lading under rules of Omaha Grain Exchange," *held* to charge a transferee, who was a member of the exchange, with notice that, as provided in such rules, title to the grain remained in the holder of the receipt until he was paid therefor.—Rainbolt v. Lamson Bros., 508.

(J) Charges and Liens.

⚷189 (U.S.C.C.A.Ohio) A shipper of goods has the right to refrain from assembling its ultimate product, or to disassemble the same, for shipment in any way that will make the shipment take a lower traffic rate than if the articles were in final form.—Lakewood Engineering Co. v. New York Cent. R. Co., 129.

Though a manufacturer of portable railway track did not attach to the rails the plates and bolts, although the sections consisted of two steel rails and steel cross-ties, which were riveted together, *held*, that the article was a "portable railway track set up in sections," within the tariff providing for that class of articles, and shipper was not entitled to commodity tariff on iron and steel rails and cross-ties.—Id.

⚷192 (U.S.C.C.A.Ohio) Though shipper billed and carrier transported its articles under a particular tariff for a considerable time, notwithstanding articles fell within another duly published tariff, *held*, that the rule that practical construction of the contract of both parties will govern does not apply, so as to defeat the carrier's action for the difference between the rate charged and that which should have been exacted; parties having no power to vary a published tariff, even by express contract.—Lakewood Engineering Co. v. New York Cent. R. Co., 129.

CHANCERY.

See Equity.

CHARGE.

See Carriers, ⚷18.

CHATTEL MORTGAGES.

See Bankruptcy, ⚷184; Sales, ⚷474.

VII. REMOVAL OR TRANSFER OF PROPERTY BY MORTGAGOR.

(A) Rights and Liabilities of Parties.

⚷217 (U.S.C.C.A.Ill.) Generally a chattel mortgage, which in the state where made is a valid prior lien upon property there situate, through comity between the states will be to the same extent a lien upon the same chattels when brought into another state; and this rule is recognized by the courts of Illinois.—Hoyt v. Zibell, 254.

That a chattel mortgagee knew that the property had been removed from Indiana to Wisconsin *held* not to deprive him of the right to assert the validity and priority of his lien under the law of Illinois, to which state the property had been taken without his knowledge.—Id.

CHINESE.

See Aliens, ⚷32.

CITIZENS.

See Courts, ⚷316, 322; Habeas Corpus, ⚷25.

CLAYTON ACT.

See Monopolies, ⚷17; Statutes, ⚷225.

COLLISION.

See Death, ⚷99.

I. RULES AND PRECAUTIONS FOR PREVENTING COLLISIONS IN GENERAL.

⚷11 (U.S.C.C.A.N.Y.) Where the owner of a motorboat, without crew, having engine trouble, and with an anchor insufficient to hold her, though his attention was called by a passenger to the obvious danger of an approaching tug and her tow, merely went to his engine to make repairs, where he could not see overboard, he and his boat were not without fault in collision with the tug's tow, there being no legal distinction in respect to rules of navigation between pleasure vessels, those operated for profit, large and small boats, or those numerously manned or operated by one man only, and the motorboat was also at fault for maintaining no lookout.—The O'Brien Brothers, 68.

VII. VESSELS AT REST, AT ANCHOR, OR AT PIERS.

⚷71(3) (U.S.C.C.A.N.Y.) Where the owner of a motorboat, without crew, having engine trouble, and with an anchor insufficient to hold her, though his attention was called by a passenger to the obvious danger of an approaching tug and her tow, merely went to his engine to make repairs, where he could not see overboard, he and his boat were not without fault in collision with the tug's tow, there being no legal distinction in respect to rules of navigation between pleasure vessels, those operated for profit, large and small boats, or those numerously manned or operated by one man only and the motorboat was also at fault for maintaining no lookout.—The O'Brien Brothers, 68.

⚷71(3) (U.S.C.C.A.Ohio) A dredge working in the Ohio river *held* grossly negligent in anchoring at night, with her assistant flats, in the middle of the towboat channel at a dangerous bend, when she had knowledge that a coal fleet was coming down, and in fault for a collision with one of the tows, not only because of the place of anchorage, but also for failure to maintain lights, as required by the rules, or to take any other precautions. The tow *held*, on the evidence, not chargeable with contributory fault.—

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Otto Marmet Coal & Mining Co. v. Fieger-Austin Dredging Co., 411.

⟹73 (U.S.C.C.A.Ohio) The rule that, in case of collision between a moving and an anchored vessel, the moving vessel is presumed to be in fault, does not apply where the anchored vessel was clearly in fault.—Otto Marmet Coal & Mining Co. v. Fieger-Austin Dredging Co., 411.

⟹74 (U.S.C.C.A.Ohio) A tow, coming into collision with a dredge anchored in the Ohio river at a dangerous bend, *held*, on the evidence, not chargeable with contributory fault.—Otto Marmet Coal & Mining Co. v. Fieger-Austin Dredging Co., 411.

⟹75 (U.S.C.C.A.Ohio) A dredge *held* in fault for failure to maintain lights as required by the rules on anchoring in the middle of the towboat channel of the Ohio river.—Otto Marmet Coal & Mining Co. v. Fieger-Austin Dredging Co., 411.

VIII. LIGHTS, SIGNALS, AND LOOKOUTS.

⟹78 (U.S.C.C.A.Ohio) Conceding that in general the absence of a lookout raises a presumption that an ensuing collision was caused or contributed to thereby, such presumption is disputable.—Otto Marmet Coal & Mining Co. v. Fieger-Austin Dredging Co., 411.

X. NARROW CHANNELS, HARBORS, RIVERS, AND CANALS.

⟹99 (U.S.C.C.A.N.Y.) A tug towing barges entering Hempstead Harbor was at fault for not maintaining a vigilant lookout to discover a drifting motorboat ahead, having no way on account of engine trouble; observers on bluffs several hundred feet from the scene of collision having been able to see all the vessels concerned with accuracy.—The O'Brien Brothers, 68.

Where the owner of a motorboat, without crew, having engine trouble, and with an anchor insufficient to hold her, though his attention was called by a passenger to the obvious danger of an approaching tug and her tow, merely went to his engine to make repairs, where he could not see overboard, he and his boat were not without fault in collision with the tug's tow, there being no legal distinction in respect to rules of navigation between pleasure vessels, those operated for profit, large and small boats, or those numerously manned or operated by one man only, and the motorboat was also at fault for maintaining no lookout. —Id.

XII. SUITS FOR DAMAGES.

(C) Evidence.

⟹123 (U.S.C.C.A.Ohio) Where the fault of one vessel for collision is clear, and is sufficient to account for the collision, she has the burden of establishing the contributory fault of the other vessel by equally clear evidence.—Otto Marmet Coal & Mining Co. v. Fieger-Austin Dredging Co., 411.

(D) Damages.

⟹144 (U.S.C.C.A.N.Y.) Where the personal negligence of the owner of a motorboat contributed to collision with a tug and her tow, he can recover against the tug only half his damages. —The O'Brien Brothers, 68.

Third persons injured by the concurrent negligence of two vessels, on one of which they are passengers, are not affected in their rights by the negligence of their vessel.—Id.

⟹145 (U.S.C.C.A.Ohio) When both vessels are in fault for a collision, the damages are to be equally divided, without regard to whether their faults were equal in degree.—Otto Marmet Coal & Mining Co. v. Fieger-Austin Dredging Co., 411.

COMITY.

See Chattel Mortgages, ⟹217.

COMMERCE.

See Carriers, ⟹55; Intoxicating Liquors, ⟹138, 236; Master and Servant, ⟹180, 204, 265, 285; Monopolies, ⟹12, 29; Negligence, ⟹101.

II. SUBJECTS OF REGULATION.

⟹27(5) (U.S.C.C.A.N.Y.) A railroad employé in charge of a signal tower and water tanks, who was injured while operating a pump for pumping water from a well into the tanks for supplying water to the locomotives of both interstate and intrastate trains, *held* engaged in work so closely related to interstate commerce as to be within Employers' Liability Act, § 1 (Comp. St. § 8657).—Erie R. Co. v. Collins, 240.

⟹27(7) (U.S.C.C.A.N.Y.) The employé of a railroad, whose work was to supply engines with sand, and who, after having carried ashes from the drying stove to the ash pit, lost his leg when struck by a locomotive on a foggy night, *held* injured in interstate commerce, so as to entitle him to maintain action under federal Employers' Act (Comp. St. §§ 8657–8665). —Erie R. Co. v. Szary, 246.

⟹27(8) (U.S.C.C.A.N.Y.) A car repairer, hit by a locomotive in a railroad yard while carrying bolts to repair a car used in interstate commerce, *held* engaged in "interstate commerce," within the Employers' Liability Act (Comp. St. §§ 8657–8665).—Central R. Co. of New Jersey v. Sharkey, 212.

COMPULSION.

See Shipping, ⟹81.

CONDEMNATION.

See Eminent Domain.

CONDITIONAL SALES.

See Sales, ⟹474.

CONSOLIDATION.

See Railroads, ⟹144.

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CONSPIRACY.

See Criminal Law, ⚷149, 423, 910; Monopolies, ⚷31; Trusts, ⚷110.

II. CRIMINAL RESPONSIBILITY.

(A) Offenses.

⚷28 (U.S.C.C.A.Tenn.) There may be a conspiracy to violate the Reed Amendment (Comp. St. 1918, §§ 8739a, 10387a–10387c) by transporting liquor into a prohibition state, indictable under Criminal Code, § 37 (Comp. St. § 10201).—Laughter v. U. S., 162.

⚷37 (U.S.C.C.A.Tenn.) To create such relation, between a conspiracy and the substantive offense which was its purpose, as ought to prevent a double prosecution, there must be a complete identity between those acts which are the overt acts essential to make the conspiracy punishable and those acts which are necessary to make out the substantive offense.—Laughter v. U. S., 162.

CONSTITUTIONAL LAW.

See Courts, ⚷282.

For validity of statutes relating to particular subjects, see also the various specific topics.

CONTINUANCE.

⚷7 (U.S.C.C.A.Ohio) The matter of granting a continuance to plaintiff, who was not ready when the case came on for trial, was discretionary with the District Court.—Lindley v. Denver, 151.

CONTRACTS.

See Account, ⚷1; Bankruptcy, ⚷101, 293, 443, 455; Carriers, ⚷192; Corporations, ⚷487; Courts, ⚷328; Damages, ⚷78; Estoppel, ⚷62; Injunction, ⚷114; Limitation of Actions, ⚷127; Master and Servant, ⚷180; Patents, ⚷209, 212; Principal and Agent, ⚷101; Sales; Shipping, ⚷52; Specific Performance.

CONTRIBUTION.

See Shipping, ⚷196.

CORPORATIONS.

See Banks and Banking; Carriers; Courts, ⚷316; Electricity; Evidence, ⚷73; Internal Revenue, ⚷7, 9, 19, 28; Patents, ⚷287, 290; Railroads; Street Railroads; Trusts, ⚷110; Wills, ⚷748.

V. MEMBERS AND STOCKHOLDERS.

(A) Rights and Liabilities as to Corporation.

⚷183 (U.S.C.C.A.R.I.) Where stockholders of a mining company, which was in possession of a claim under an option contract of purchase allowing the company to abandon the purchase on forfeiture of payments made, secretly acquired the claim and concealed that fact from the company, accepted payments, and later declared a forfeiture for nonpayments, *held*, that the stockholders some of whom had been directors could not justify the secrecy on the theory that until they had been paid the full amount which they paid for the claim they were entitled to conceal the true situation, but such stockholders are immediately responsible for their fraud.—Munro v. Smith, 1.

VI. OFFICERS AND AGENTS.

(C) Rights, Duties, and Liabilities as to Corporation and Its Members.

⚷308(1) (U.S.C.C.A.R.I.) If a manager of a mining company, the scene of whose operations were in a state far distant from that in which the stockholders and directors resided, rendered no faithful service to the company and joined with stockholders and directors all of whom were maneuvering to get the property away from the company for their own benefit, there can be no recovery for services after the time the agent joined in the conspiracy.—Munro v. Smith, 1.

VII. CORPORATE POWERS AND LIABILITIES.

(D) Contracts and Indebtedness.

⚷487(1) (U.S.C.C.A.Ill.) A contract by defendant corporation to lend money to complainant, which defendant was without charter power to make, is void, and neither party can enforce it or predicate upon it any right of recovery.—National Trust & Credit Co. v. F. H. Orcutt & Son Co., 630.

XI. DISSOLUTION AND FORFEITURE OF FRANCHISE.

⚷619 (U.S.C.C.A.Mont.) Under Rev. Codes Mont. §§ 3906, 6700, on dissolution of a corporation its directors become trustees, with power to settle its affairs and to sell property, but without title, which, subject to the trust, vests in the stockholders, who as to its real estate become tenants in common.—Barker v. Edwards, 460.

COUNTIES.

See Bankruptcy, ⚷101, 293, 443, 455.

IV. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

⚷182 (U.S.C.C.A.La.) An unconditional bidder for bonds of a road district, who voluntarily made a deposit, to be applied on the purchase if the bid was accepted, and retained by the district as liquidated damages if he refused to take them, *held* not entitled to recover the deposit on such refusal on the unjustified contention that they were invalid.—Stacy & Braun v. Parish of Natchitoches, 280.

COURT RULES CITED.

Equity Rule 90–151.

COURTS.

See Admiralty, ⚷118; Bankruptcy, ⚷20, 101, 210, 288, 293, 443; Guardian and Ward, ⚷81, 108; Indians, ⚷15; Indictment and Information, ⚷28.

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I. NATURE, EXTENT, AND EXERCISE OF JURISDICTION IN GENERAL.

⚷30 (U.S.C.C.A.Ohio) While a court will not permit a case to lie dormant indefinitely, with the consent of everybody, and then allow it to be used by one party against the objection of the other as a basis for exercising power that would not otherwise exist, mere unexplained inaction for a year and a half does not ipso facto destroy the power of the court to proceed when both parties consent.—City of Toledo v. Toledo Rys. & Light Co., 426.

VII. UNITED STATES COURTS.

(A) Jurisdiction and Powers in General.

⚷278 (U.S.C.C.A.Ohio) Where, after the decision of federal court to appoint a receiver for a street railroad company, a plan was agreed to by the parties for the operation of the property under direction of the court which was in effect a substitute for the receivership, which plan was carried out for a number of years, the court did not during such time lose jurisdiction of the case.—City of Toledo v. Toledo Rys. & Light Co., 426.

(B) Jurisdiction Dependent on Nature of Subject-Matter.

⚷282(1) (U.S.C.C.A.Ohio) A federal court has jurisdiction of a bill, whether original or ancillary, which raises an issue involving constitutional rights.—City of Toledo v. Toledo Rys. & Light Co., 426.

(C) Jurisdiction Dependent on Citizenship, Residence, or Character of Parties.

⚷312(4) (U.S.C.C.A.Kan.) The change of language in Judicial Code, § 24 (Comp. St. § 991 [1]) from a suit "to recover the contents of any promissory note" as in Rev. St. § 629, to a suit "upon any promissory note" has not changed the law, and the old construction is still applicable.—Harlan v. Houston, 65.

⚷312(5) (U.S.C.C.A.Kan.) A suit to redeem from a foreclosure sale of land and for an accounting by defendant as mortgagee in possession is not one on the note and mortgage within Judicial Code, § 24 (Comp. St. § 991[1]), and where there is diversity of citizenship between the parties a federal court has jurisdiction, although the payee of the note was a citizen of the same state as complainant.—Harlan v. Houston, 65.

⚷316 (U.S.C.C.A.Ohio) The fact alone that a complainant through ownership of stock of another corporation had a controlling stock interest in defendant corporation *held* not to deprive a federal court of jurisdiction, where there was the requisite diversity of citizenship.—City of Toledo v. Toledo Rys. & Light Co., 426.

⚷322(3) (U.S.C.C.A.Colo.) An allegation in a bill of the citizenship of a corporation carries with it that of the citizenship of its directors, where they appear in the suit only as representatives of the corporation.—Gas Securities Co. v. Antero & Lost Park Reservoir Co., 399.

(D) Jurisdiction Dependent on Amount or Value in Controversy.

⚷328(4) (U.S.C.C.A.Pa.) If contracts confer no rights on plaintiff broker to recover in its own right for breach, and the real plaintiffs are the three individuals named, the individual rights, each of which is less than the jurisdictional requirement, cannot be lumped together to create a case for federal jurisdiction.—Smith-Webster Co. v. John, 511.

(E) Procedure, and Adoption of Practice of State Courts.

⚷332 (U.S.C.C.A.Ohio) The Supreme Court, in adopting new equity rules in 1912 (198 Fed. xix, 115 C. C. A. xix), and in thus declining longer to retain the English chancery practice of 1842 as a standard, did not intend to abolish the whole body of federal equity practice which had grown up under the old rule 90 and had become the accepted practice in the Supreme and all inferior courts; the old practice continuing, except as it was changed.—Lindley v. Denver, 151.

⚷342 (U.S.C.C.A.Ohio) Where a surgeon became bankrupt when a judgment for malpractice was rendered against him, an action by the trustee in bankruptcy against a so-called liability insurer, which agreed to indemnify the surgeon for liability for malpractice, etc., must be considered to be one at law, though the parties proceeded on the assumption that it was one in equity, so an appeal from the judgment for insurer must be dismissed.—Schambs v. Fidelity & Casualty Co. of New York, 55.

⚷356 (U. S. C. C. A. Conn.) The Conformity Statute (Comp. St. § 1537) has no application to bills of exception, or to the mode of reviewing a decision once made in a federal district court.—Buessel v. U. S., 105.

Under equity rule 75b (198 Fed. xl, 115 C. C. A. xl), until the statement of the evidence in an equity case has been approved by the trial court or judge, it is not a part of the record for purposes of appeal.—Id.

(F) State Laws as Rules of Decision.

⚷359 (U.S.C.C.A.Mass.) Federal courts recognize no lien of an attorney at common law beyond that given by the local law.—Turner v. Woodard, 537.

⚷365 (U.S.C.C.A.Kan.) Where the highest court of a state has determined that a particular foreclosure sale was void and the purchaser a mortgagee in possession, such decision is the law of a subsequent case in a federal court involving the validity of the same sale.—Harlan v. Houston, 65.

⚷366(1) (U.S.C.C.A.Mass.) The decision of the highest state court construing a state statute is binding on the federal courts.—Turner v. Woodard, 537.

⚷366(16) (U.S.C.C.A.Okl.) Decision of the highest court of a state, determining when an order approving a deed of real property in the state is sufficient to give the deed full validity, constitutes a rule of real property, and probably binds a federal court sitting in the state.—Barnett v. Kunkel, 370.

⚷366(29) (U.S.C.C.A.Mich.) Where an action for death involves the application of the Michigan survival and death statutes, so far as the

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Michigan Supreme Court has established a rule as to when the action accrues under one statute rather than the other, the Circuit Court of Appeals should follow such rule, and not the decisions construing the federal statute.—Detroit United Ry. v. Weintrobe, 136.

⚷366(30) (U.S.C.C.A.Okl.) A decision of the highest court of a state, defining the powers of an inferior court under the state Constitution and laws, is binding on the Circuit Court of Appeals.—Barnett v. Kunkel, 370.

(H) Circuit Courts of Appeals.

⚷403(5) (U.S.C.C.A.Ill.) The Circuit Court of Appeals is without jurisdiction to review an order of a District Court dismissing a cause on the express grounds of want of jurisdiction.—Blumenstock Bros. Advertising Agency v. Curtis Pub. Co., 123.

⚷405(18) (U.S.C.C.A.Ky.) That, since the rendition of an opinion by the Circuit Court of Appeals, the highest appellate court of the state, having cognizance of such opinion, has reached a contrary conclusion in another case, is not ground for a rehearing, especially where the facts involved in the state case may have presented a ground of distinction between the two cases.—Hopkins v. Zeigler, 43.

COVENANTS.

See Landlord and Tenant, ⚷44; Sales, ⚷58.

CRIMINAL LAW.

See Army and Navy, ⚷40; Conspiracy, ⚷28-37; Embezzlement; Homicide; Indictment and Information; Injunction, ⚷105; Internal Revenue, ⚷39, 40, 47; Intoxicating Liquors, ⚷169, 229, 236; Monopolies, ⚷12, 29, 31; Perjury; Post Office, ⚷35, 48, 49; Prostitution; Receiving Stolen Goods; Searches and Seizures, ⚷5; United States, ⚷125; War, ⚷4; Witnesses.

VI. LIMITATION OF PROSECUTIONS.

⚷149 (U.S.C.C.A.Ill.) In a prosecution under the Sherman Anti-Trust Act for unlawfully conspiring to restrain trade, the statute of limitations does not run from the time the combination was originally made, but only from the time a conspirator indicates his withdrawal from the combination by some affirmative act.—Boyle v. U. S., 603.

X. EVIDENCE.

(A) Judicial Notice, Presumptions, and Burden of Proof.

⚷315 (U.S.C.C.A.S.D.) It cannot be presumed that a lawful state of mind. unaccompanied by expressions showing willingness to violate law, will change into a criminal intent under a future statute.—Wolf v. U. S., 364.

⚷317 (U.S.C.C.A.Tenn.) The fact that defendants did not see fit to take the stand and deny the charges made against them could not be allowed to raise in the minds of the jury any inference of guilt.—Mayer v. U. S., 284.

⚷330 (U.S.C.C.A.Tenn.) Where defendant was charged with carrying on the business of a retail liquor dealer without having obtained a federal license and paid the special tax, the government need not prove the nonpayment of tax, for the matter was peculiarly within the knowledge of defendant, and he might prove payment without inconvenience.—Faraone v. U. S., 483.

(C) Other Offenses and Character of Accused.

⚷369(6) (U.S.C.C.A.Okl.) In a prosecution for unlawful introduction of liquor into a state, evidence tending to show that defendant was also concerned in another attempted introduction of liquor on the same night *held* inadmissible.—Ford v. U. S., 514.

⚷370 (U.S.C.C.A.N.J.) In prosecution for receiving stolen goods, in violation of Act Feb. 13, 1913 (Comp. St. §§ 8603, 8604), testimony relating to a similar transaction a few days before *held* admissible to show accused's acquaintance with the thieves.—Le Fanti v. U. S., 436.

⚷371(1) (U.S.C.C.A.Cal.) Intent being part of the offense, evidence of other acts or words of defendant than those charged are admissible to show his attitude of mind and intent or purpose.—Schulze v. U. S., 257.

⚷371(1) (U.S.C.C.A.Or.) On the trial of a defendant for using the mails in carrying out a scheme to defraud, evidence that he had previously defrauded other persons by means of a similar scheme was admissible, where limited to the question of intent.—Bryon v. U. S., 347.

⚷371(1) (U.S.C.C.A.S.D.) In a prosecution for violation of Espionage Act June 15, 1917, testimony as to statements by defendant made a few weeks before the enactment of the statute, though ordinarily admissible as tending to show defendant's state of mind, ordinarily presumed to continue, *held* inadmissible, as it cannot be presumed that a lawful state of mind, unaccompanied by expressions showing willingness to violate law, will change into a criminal intent under a future statute.—Wolf v. U. S., 364.

(D) Materiality and Competency in General.

⚷395 (U.S.C.C.A.Tenn.) It was not error to admit in evidence against a defendant papers taken from his pocket after his arrest, where their return had not been requested.—Laughter v. U. S., 162.

(E) Best and Secondary and Demonstrative Evidence.

⚷400(4) (U.S.C.C.A.Tex.) The rule against secondary evidence of the contents of written instruments is less stringent, where the evidence is negative, as in the case of testimony that a certain column for signatures opposite 56 names on a pay roll blank, than it is where the attempt is to reproduce orally the written language of an instrument, especially one that creates or disposes of rights.—Gurinsky v. U. S., 354.

(F) Admissions, Declarations, and Hearsay.

⚷418(2) (U. S. C. C. A. Tenn.) Statement of helper, in presence of owner of boat, and not questioned by him, when officers came on board and asked the destination of whisky thereon,

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that they expected the owner of the whisky to meet them at one of two points in Tennessee with two trucks on which to unload it, is admissible against the boat owner, prosecuted for transporting the whisky into Tennessee in violation of Act March 3, 1917, § 5 (Comp. St. 1918, § 8739a).—Bishop v. U. S., 263.

⚷419, 420(3) (U.S.C.C.A.Tenn.) In a prosecution for carrying on the business of a retail dealer without having paid the special tax therefor, it was prejudicial error to permit the prosecuting witness on direct examination to testify that he undertook to buy liquor from defendant because he had been told that defendant was selling.—Biandi v. U. S., 161.

(G) Acts and Declarations of Conspirators and Codefendants.

⚷423(3) (U.S.C.C.A.Ill.) In a prosecution under the Sherman Anti-Trust Act against employers and employés for conspiring to prevent any but union-made switchboards being installed in Chicago, evidence that a defendant trade-unionist exacted payments from builders installing other switchboards as a condition of not calling strikes, etc., *held* admissible as an act of one coconspirator in furtherance of the object of the conspiracy.—Boyle v. U. S., 603.

(K) Confessions.

⚷534(1) (U.S.C.C.A.Tenn.) In prosecution for violating the Reed Amendment (Comp. St. 1918, § 8739a), evidence *held* sufficient to corroborate the confession of the defendant that he had brought the liquor from another state.—Berryman v. U. S., 276.

⚷535(2) (U.S.C.C.A.Tenn.) Defendant's confession that he had transported liquor across the state line *held* sufficiently corroborated by the further evidence.—Berryman v. U. S., 276.

(M) Weight and Sufficiency.

⚷559 (U.S.C.C.A.Tenn.) A verdict in a criminal case may rest upon rightful inference, as well as upon direct testimony.—Robilio v. U. S., 169.

XII. TRIAL.

(A) Preliminary Proceedings.

⚷628(7) (U.S.C.C.A.Tenn.) In a prosecution for engaging in the retail liquor business without having paid the tax required, allowance of testimony for the government of witnesses whose names were not indorsed upon the indictment *held* within the discretion of the trial court.—Mayer v. U. S., 284.

(B) Course and Conduct of Trial in General.

⚷656(7) (U.S.C.C.A.Tenn.) Remarks of the court to the effect that the situation created by the government's proofs remained unexplained *held* not a comment on defendant's failure to testify.—Robilio v. U. S., 169.

(C) Reception of Evidence.

⚷683(2) (U.S.C.C.A.Tenn.) In a prosecution for engaging in the retail liquor business without having paid the tax required, refusal of bill of particulars, allowance of testimony for the government of witnesses whose names were not indorsed upon the indictment, and the scope of the opportunity allowing defendants to meet such unexpected proof, *held* matters resting in the discretion of the trial court.—Mayer v. U. S., 284.

(E) Arguments and Conduct of Counsel.

⚷723(5) (U.S.C.C.A.Tex.) Where the United States attorney in argument was permitted to characterize defendant, named Gurinsky, as a gambling Jew, against objection there was no evidence as to what race defendant belonged, it cannot be said that there was error; the name and circumstance of defendant's change of name having been some evidence of his race, while his appearance, accent, and demeanor may have been pertinent evidence.—Gurinsky v. U. S., 354.

(F) Province of Court and Jury in General.

⚷742(1) (U.S.C.C.A.Tenn.) The jury is the sole judge of the credibility of witnesses in a prosecution for crime.—Mayer v. U. S., 284.

⚷757(1) (U.S.C.C.A.Cal.) Instruction that the court sees no reason why the government witnesses should not be believed, but telling the jury that they are the exclusive judges as to the credibility of witnesses and the weight of the evidence and of the facts, does not go beyond the rule of permissible comment in a federal court.—Schulze v. U. S., 257.

⚷762(3) (U.S.C.C.A.R.I.) For the judge to direct the jury's attention to certain lines of investigation and inquiry that might test the question whether a letter introduced by defendant to discredit government's witness was fabricated, even if implying the judge had an opinion thereon, was not error; he expressly leaving to them determination of whether to follow such lines, and, if they did so, what weight should be given to inferences so drawn, and telling them to disregard any opinion expressed by him.—Balcom v. U. S., 579.

(G) Necessity, Requisites, and Sufficiency of Instructions.

⚷778(2) (U.S.C.C.A.S.C.) That an instruction charges that it devolves on the government to prove "every material fact" necessary to constitute the offense, instead of "every material ingredient," does not constitute error.—Guignard v. U. S., 61.

⚷786(3) (U.S.C.C.A.Cal.) Instruction that the interest of defendant in the result should be considered in weighing his testimony, and in determining how far, or to what extent, if at all, it is worthy of credit, is proper.—Schulze v. U. S., 257.

⚷787(1) (U.S.C.C.A.Tenn.) It is not necessarily error to instruct the jury, in the language of the statute, that defendant's failure to testify creates no presumption against him.—Robilio v. U. S., 169.

⚷789(4) (U.S.C.C.A.S.C.) An instruction in a criminal case on the subject of reasonable doubt and the presumption of innocence *held* correct.—Maupin v. U. S., 61.

⚷789(9) (U.S.C.C.A.Cal.) Where the jury was charged that defendant must be proven guilty beyond a reasonable doubt, and that reasonable doubt, is such as leaves the minds of the jurors in that condition that they cannot

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feel an abiding conviction to a moral certainty of defendant's guilt, it was not error to further charge that the prosecution was not called upon to make the case free from any possible doubt by proving defendant's guilt to an unassailable demonstration.—Crane v. U. S., 456.

⚷812 (U.S.C.C.A.S.D.) In prosecution for violation of Espionage Act June 15, 1917, instructions using language by way of illustration and explanation which ordinarily would have been proper, and covering certain situations shown in the evidence, which were not the particular ones covered by the indictment, tending to inflame and divert the jury, *held* erroneous.—Wolf v. U. S., 364.

(H) Requests for Instructions.

⚷829(9) (U.S.C.C.A.Cal.) Where the instructions charged that the presumption of innocence, that finding of the indictment was not proof of guilt, and that suspicion or probability of guilt would not justify conviction, the refusal of a requested instruction that the jury could not convict because defendant had been arrested on the charge preferred was not error.—Crane v. U. S., 456.

(J) Custody, Conduct, and Deliberations of Jury.

⚷862 (U.S.C.C.A.Tenn.) Merely from the common knowledge regarding the nature of the Mississippi and its winding channel, the jury would be entitled to infer that a considerable part of the journey down it, for over 100 miles constantly opposite Tennessee, of defendant's light draft small power boat, the natural effort of which would be to make as straight a course as possible, had been within the limits of Tennessee.—Bishop v. U. S., 263.

(K) Verdict.

⚷878(3) (U.S.C.C.A.Colo.) Since the commission of an offense in different ways may be charged in separate counts of an indictment, to meet the proof, an acquittal on one count does not invalidate a conviction on another.—Huffman v. U. S., 35.

XIII. MOTIONS FOR NEW TRIAL AND IN ARREST.

⚷910 (U.S.C.C.A.Pa.) Where several persons, tried together, have been convicted of a conspiracy, the granting of a new trial to certain of the defendants, against whom there was no evidence, and who were not shown to have said or done anything which could be prejudicial to their codefendants, does not confer upon the others the right to a new trial.—Belfi v. U. S., 622.

⚷935(2) (U.S.C.C.A.Tenn.) It is not proper practice to reserve a claim that venue was not sufficiently proved for determination on a motion for new trial.—Turner v. U. S., 171.

⚷956(1) (U.S.C.C.A.Tenn.) The fact that defendants did not see fit to take the stand and deny the charges made against them could not be allowed to raise in the minds of the jury any inference of guilt, but it was a matter proper for the court to consider in passing on a motion for new trial and in deciding whether the refusal to give defendants some delay on account of certain unexpected testimony had been seriously prejudicial to them.—Mayer v. U. S., 284.

XIV. JUDGMENT, SENTENCE, AND FINAL COMMITMENT.

⚷984 (U.S.C.C.A.Conn.) Unless a court, imposing sentence under each of several counts in an indictment, otherwise directs, the sentences under all run concurrently, and the fact that one count is defective does not entitle defendant to release from imprisonment.—Buessel v. U. S., 105.

XV. APPEAL AND ERROR, AND CERTIORARI.

(A) Form of Remedy, Jurisdiction, and Right of Review.

⚷1023(3) (U.S.C.C.A.N.Y.) An order of a District Court denying the petition of defendants in a criminal case for return of books and documents seized as having been used in commission of a felony, under search warrants issued pursuant to Act June 15, 1917, tit. 11, § 2 (Comp. St. 1918, § 10496¼b), and held as evidence, whatever the proceeding may be entitled, is an interlocutory order in the criminal case, and under Judicial Code, § 128 (Comp. St. § 1120), is not reviewable by the Circuit Court of Appeals.—Coastwise Lumber & Supply Co. v. U. S., 647.

(B) Presentation and Reservation in Lower Court of Grounds of Review.

⚷1030(3) (U.S.C.C.A.Tenn.) Where it is sought to differentiate the case of an employé from that of his employer, charged together with an offense, in view of Criminal Code, § 332 (Comp. St. § 10506), making aiders and abettors principals, the points relied on must be brought to the attention of the trial court.—Turner v. U. S., 171.

⚷1044 (U.S.C.C.A.Colo.) Ruling on a motion by defendant for direction of a verdict, made at the close of the government's case, cannot be assigned for error, unless the motion is renewed at the close of all the evidence.—Huffman v. U. S., 35.

⚷1048 (U.S.C.C.A.Tenn.) Where it is sought to differentiate the case of an employé from that of his employer, charged together with an offense, in view of Criminal Code, § 332 (Comp. St. § 10506), making aiders and abettors principals, the points relied on must be brought to the attention of the trial court, and exceptions saved to its rulings, to insure review by the appellate court.—Turner v. U. S., 171.

(D) Record and Proceedings Not in Record.

⚷1090(1) (U.S.C.C.A.Conn.) A statute which authorizes a writ of error to be sued out thereby allows a bill of exceptions to be signed and used in connection therewith, for it is only through such bill that the rulings of the judge made at the trial become a part of the record to be reviewed.—Buessel v. U. S., 105.

A "bill of exceptions" is a formal statement in writing of the exceptions duly taken at the trial to the decisions and instructions of the judge, with as much of the testimony as is nec-

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essary to enable the court to say whether error at law was committed in respect to the particular decisions or instructions as to which the exceptions were taken.—Id.

⚷1090(2) (U.S.C.C.A.Conn.) Judicial Code, § 269, as amended by Act Feb. 26, 1919, requiring appellate courts to "give judgment after an examination of the entire record before the court without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties," does not dispense with the necessity of a bill of exceptions to bring into the record matters which would not otherwise be a part thereof; but the record to which the act refers is that which is legally the record.—Buessel v. U. S., 105.

⚷1090(5) (U.S.C.C.A.Conn.) A demurrer to an indictment is a part of the record proper, and is not dependent on a bill of exceptions.—Buessel v. U. S., 105.

⚷1090(8) (U.S.C.C.A.Conn.) The general rule has been that in actions at law evidence introduced or offered and rejected at the trial and rulings thereon can be brought before the appellate court only by bill of exceptions, and such rules apply to criminal as well as to civil cases.—Buessel v. U. S., 105.

⚷1090(14) (U.S.C.C.A.Conn.) The general rule has been that in actions at law evidence introduced or offered and rejected at the trial, and rulings thereon, can be brought before the appellate court only by bill of exceptions, and unless a statute otherwise provided such bill has been necessary to bring into the record for review the instructions and requests to charge; and such rules apply to criminal as well as to civil cases.—Buessel v. U. S., 105.

⚷1090(19) (U.S.C.C.A.Conn.) Where there has been an actual trial, the parties are not at liberty to substitute a written stipulation or agreed statement of facts as to what occurred at the trial in lieu of the bill of exceptions required.— Buessel v. U. S., 105.

⚷1091(10) (U.S.C.C.A.Conn.) The rule has been elementary, and applicable in criminal proceedings as well as in civil, that a ruling of the trial court upon the admission of evidence will not be reviewed in the appellate court, unless the bill of exceptions shows that an exception was taken thereto.—Buessel v. U. S., 105.

(G) Review.

⚷1134(7) (U.S.C.C.A.Conn.) Act Sept. 6, 1916, § 4 (Comp. St. § 1649a), providing that no reviewing court shall dismiss an appeal solely because a writ of error should have been sued out, but that "when such mistake or error occurs it shall disregard the same and take the action which would be appropriate if the proper appellate procedure had been followed," does not authorize an appellate court, where a criminal case has been brought up by appeal, to exercise the same comprehensive powers of review which it is entitled to exercise when an appeal is rightfully taken, and review both the law and facts.—Buessel v. U. S., 105.

⚷1165(1) (U.S.C.C.A.Tenn.) Denial of a motion by defendant for the return of papers taken from his pocket after arrest *held* error, but without prejudice; the only one admitted in evidence being cumulative upon a point fully established otherwise.—Laughter v. U. S., 162.

⚷1169(10) (U.S.C.C.A.Tex.) In a prosecution for violation of Penal Code, § 47 (Comp. St. § 10214), by embezzling moneys of the United States while acting as paymaster's clerk, admission of evidence for the government that certain pay rolls, the originals of which were shown to be in the possession of the government at Washington, did not contain receipt signatures after the names of 56 employés, *held* not reversible error, in view of negative character of evidence.—Gurinsky v. U. S., 354.

⚷1178 (U.S.C.C.A.N.J.) A proposition in a criminal case, merely mentioned during the argument, but not raised in brief, nor at trial, nor contained in the assignments of error, will not be considered.—Le Fanti v. U. S., 436.

(H) Determination and Disposition of Cause.

⚷1186(1) (U.S.C.C.A.Okl.) Where testimony vital to conviction is given under duress, no conviction based thereon will be permitted to stand.—Ford v. U. S., 514.

CROPS.

See Quieting Title, ⚷12.

CUSTOMS AND USAGES.

See Master and Servant, ⚷105, 243.

CUSTOMS DUTIES.

See Criminal Law, ⚷330.

DAMAGES.

See Collision, ⚷144, 145; Death, ⚷99; Husband and Wife, ⚷209; Negligence, ⚷101; Patents, ⚷287, 318, 322.

III. GROUNDS AND SUBJECTS OF COMPENSATORY DAMAGES.

(A) Direct or Remote, Contingent, or Prospective, Consequences or Losses.

⚷46 (U.S.C.C.A.Mich.) Where two sisters, passengers on a steamer, contracted typhoid fever as a result of drinking impure water furnished, *held* that they could recover for medical expenses, and the expense of nurses, though such sums were paid by their parents.—Chicago, D. & G. B. Transit Co. v. Moore, 466.

(B) Aggravation, Mitigation, and Reduction of Loss.

⚷62(4) (U.S.C.C.A.N.Y.) To get another cargo as good as can be obtained and as quickly as is reasonably possible is the extreme measure of a shipowner's obligation to mitigate damages on notice by the charterer that he will not load.—Steger v. Orth, 73.

IV. LIQUIDATED DAMAGES AND PENALTIES.

⚷78(4) (U.S.C.C.A.Cal.) In a contract by which respondent agreed to receive and pay for at least 1,200 salmon from each libelant every 24 hours, a provision that, in case of detention of a boat from delivering for six hours after

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arrival, the boat should be credited with 25 per cent. additional salmon, and given an equal credit for each hour's further delay, *held* a stipulation for a penalty and not for liquidated damages.—Alioto v. Pedersen, 656.

VI. MEASURE OF DAMAGES.

(A) Injuries to the Person.

⚷96 (U.S.C.C.A.N.J.) That the judge in a personal injury action has on a previous trial reduced a verdict for plaintiff, but has failed to make a like reduction on a second trial does not evidence a clear abuse of discretion in refusing to reduce damages or to grant a new trial, where nearly two years' interest has accrued since the first trial, economic conditions had changed, and the difference between the amount awarded and that considered proper on the first trial was small.—Philadelphia & R. Ry. Co. v. McKibbin, 452.

VII. INADEQUATE AND EXCESSIVE DAMAGES.

⚷130(1) (U.S.C.C.A.Mich.) Where a passenger on a vessel who owned and conducted a grocery business contracted typhoid fever as a result of the impure drinking water furnished, causing loss of time, etc., *held* that an award of $7,500 for pain, suffering, and expense and loss of time was excessive by $2,500.—Chicago, D. & G. B. Transit Co. v. Moore, 466.

On a libel by a passenger on a steamer who contracted typhoid as a result of impure drinking water furnished, *held* that an allowance of $216 for medical services and drugs, plus $80 for four weeks' services of the passenger's wife in nursing him, together with an award of $250 for two months' loss of business, as well as an award of $2,000 for pain and suffering, was not excessive.—Id.

⚷131(1) (U.S.C.C.A.Mich.) An award of $1,500 for pain and suffering in favor of passengers on a steamer, who contracted typhoid fever as a result of drinking impure water furnished, *held* not excessive.—Chicago, D. & G. B. Transit Co. v. Moore, 466.

⚷132(1) (U.S.C.C.A.Mich.) An award of $2,000 for past and future suffering, as well as $1,500 for medical expense, in favor of a passenger on a steamer who contracted typhoid fever, which resulted in gallstones necessitating an operation, *held* not excessive, where the wound made by the operation never healed, and a drainage tube had to be inserted, etc.—Chicago, D. & G. B. Transit Co. v. Moore, 466.

⚷133 (U.S.C.C.A.Mich.) An award of $7,500 for loss of time from business in favor of a passenger on a steamer who contracted typhoid fever resulting in gallstones, as the result of drinking impure water furnished *held* not warranted, and it should be reduced to $1,000.—Chicago, D. & G. B. Transit Co. v. Moore, 466.

An award of $7,000 for loss of time from business in favor of a passenger who contracted arthritis as a result of an intestinal infection caused by drinking impure water furnished on respondent's vessel, *held* not an excessive award for the passenger's loss of time.—Id.

VIII. PLEADING, EVIDENCE, AND ASSESSMENT.

(B) Evidence.

⚷163(1) (U.S.C.C.A.Wash.) To entitle plaintiff in an action for personal injury to compensatory damages for loss of time, there must be evidence of his earning capacity.—Oregon-Washington R. & Nav. Co. v. Branham, 517.

(C) Proceedings for Assessment.

⚷216(10) (U.S.C.C.A.N.Y.) Shame and humiliation, which an injured employé may suffer as a result of a facial disfigurement, may properly be considered, under a charge permitting damages for mental suffering.—Erie R. Co. v. Collins, 240.

DEATH.

See Appeal and Error, ⚷237, 264, 719, 1050, 1053; Courts, ⚷366; Master and Servant, ⚷128, 285; Trial, ⚷248, 251.

I. EVIDENCE OF DEATH AND OF SURVIVORSHIP.

⚷1 (U.S.C.C.A.Mich.) There is a presumption, when persons are proved to have been living, that the same state of things as to their life continues, at least for a relatively short space of time.—Detroit United Ry. v. Weintrobe, 132.

⚷6 (U.S.C.C.A.Mich.) In an action for death, the burden is on defendant to show that decedent's wife and children in a foreign country swept over by advancing and retreating armies, were dead at the time of suit.—Detroit United Ry. v. Weintrobe, 132.

II. ACTIONS FOR CAUSING DEATH.

(A) Right of Action and Defenses.

⚷10 (U.S.C.C.A.Mich.) Rights of action under Michigan "survival act," where the person injured survives the injury for an appreciable time, and under the "death act," where death is instantaneous, are separate and distinct, and may not exist at the same time.—Detroit United Ry. v. Weintrobe, 136.

⚷16 (U.S.C.C.A.Mich.) Rights of action under Michigan "survival act," where the person injured survives the injury for an appreciable time, and under the "death act," where death is instantaneous, are separate and distinct, and may not exist at the same time.—Detroit United Ry. v. Weintrobe, 136.

(E) Damages, Forfeiture, or Fine.

⚷99(4) (U.S.C.C.A.N.Y.) Awards of $5,000 and $6,000, under Code Civ. Proc. N. Y. § 1902 et seq., for death of two childless married women, when a tug collided with a motorboat belonging to the husband of one of them, *held* not excessive, though the husband suing as administrator was guilty of negligence contributing to the collision.—The O'Brien Brothers, 68.

(F) Trial, Judgment, and Review.

⚷103(1) (U.S.C.C.A.Mich.) Where one injured breathed or gasped for breath while unconscious for about 15 minutes after the accident, whether there was a survival, so that the cause

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of action was under the Michigan survival act, or no survival, so that it was under the death act, *held* for the jury.—Detroit United Ry. v. Weintrobe, 136.

DEEDS.

See Adverse Possession, ⚷100; Courts, ⚷366; Guardian and Ward, ⚷105; Indians, ⚷15; Judgment, ⚷521, 675; Mortgages.

DEPOSITS IN COURT.

See Bankruptcy, ⚷293; Landlord and Tenant, ⚷213.

DESCENT AND DISTRIBUTION.

See Indians, ⚷15; Judgment, ⚷521; Wills.

III. RIGHTS AND LIABILITIES OF HEIRS AND DISTRIBUTEES.

(A) Nature and Establishment of Rights in General.

⚷83 (U.S.C.C.A.Ohio) In an equity suit for rescission of settlement of the estate of plaintiff's mother, the court in its final decree can properly marshal and dispose of any equities that might exist in connection with any duty on the part of plaintiff to tender the consideration back.—Lindley v. Denver, 151.

Bill by a daughter for rescission of a settlement of her mother's estate *held* not insufficient on its face, and subject to dismissal on motion for failure to allege any necessary tender back of consideration by the daughter to support the rescission, which, under defendants' answers, evidently would have been refused.—Id.

In a daughter's suit to rescind a settlement of her mother's estate, bill and defendants' pleadings in opposition *held* to raise an issue of fact whether or not certain stock was or was not a part of the estate of plaintiff's mother, to a trial of which plaintiff was entitled, so that dismissal of the bill, after denial of plaintiff's motion for leave to dismiss voluntarily without prejudice, was erroneous.—Id.

DIRECTOR GENERAL OF RAILROADS.

See Railroads, ⚷5½.

DISEASE.

See Damages, ⚷130, 131, 132, 133.

DISLOYALTY.

See Army and Navy, ⚷40; Criminal Law, ⚷371, 812; War, ⚷4.

DISMISSAL AND NONSUIT.

See Courts, ⚷342; Descent and Distribution, ⚷83; Equity, ⚷359–365; Judgment, ⚷654; Patents, ⚷324.

DISTRICT AND PROSECUTING ATTORNEYS.

See Criminal Law, ⚷723; Indictment and Information, ⚷28; Injunction, ⚷105; United States, ⚷125.

DRAINS.

See Estoppel, ⚷62.

DRAMSHOPS.

See Intoxicating Liquors.

DRAWBRIDGES.

See Shipping, ⚷86; Towage, ⚷19.

DREDGES.

See Collision, ⚷71, 74, 75.

DURESS.

See Criminal Law, ⚷1186.

EJECTMENT.

I. RIGHT OF ACTION AND DEFENSES.

⚷9(3) (U. S. C. C. A. W. Va.) In ejectment, plaintiff must recover on the strength of his own title, and not on the weakness of the defendant's title.—Thomas v. Lukens, 505.

ELECTION OF REMEDIES.

See Bankruptcy, ⚷296, 363.

ELECTRICITY.

See Appeal and Error, ⚷237, 1053; Trial, ⚷248.

⚷14(1) (U.S.C.C.A.Mich.) Where an electric company constructed a high tension line, which wires carried a deadly current of electricity, the deadly nature of such agency imposes on it duties of care.—Curcuru v. Peninsular Electric Light Co., 79.

EMBEZZLEMENT.

See Criminal Law, ⚷1169; Receiving Stolen Goods, ⚷3.

⚷47 (U.S.C.C.A.Tex.) In a prosecution for violation of Penal Code, § 47 (Comp. St. § 10214), by embezzling moneys of the United States while acting as paymaster's clerk, where there was evidence tending to show there was a shortage in the pay roll money, and that defendant was accountable, the trial court could not have properly directed verdict.—Gurinsky v. U. S., 354.

EMINENT DOMAIN.

See Attorney and Client, ⚷135, 175; Equity, ⚷66; Estoppel, ⚷79; Railroads, ⚷144; Trusts, ⚷84.

II. COMPENSATION.

(D) Persons Entitled and Payment.

⚷158 (U.S.C.C.A.Mass.) Where all the parties interested in the fund to be derived from the condemnation of land by the United States, title to which stood in the name of a bankrupt, and which was incumbered by mortgages, agreed that the proceeds should be paid into court, which should have full power and authority to determine the respective rights and priorities of

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the claimants, the proceeding must be deemed an equitable one, for only equity could determine the rights of intervening creditors, mortgagees, etc.—Turner v. Woodard, 537.

III. PROCEEDINGS TO TAKE PROPERTY AND ASSESS COMPENSATION.

⚷168(2) (U.S.C.C.A.Mass.) Under Act Aug. 18, 1890 (Comp. St. § 6911), the Secretary of War may cause proceedings to be instituted in any court having jurisdiction of such proceedings for the acquisition by condemnation of lands in accordance with the laws relating to suits for condemnation of property of the states wherein the proceedings may be initiated, but, if the owner fixes a price which is reasonable, the Secretary may purchase forthwith.—Turner v. Woodard, 537.

⚷243(1) (U.S.C.C.A.Mass.) Under Rev. Laws Mass. c. 1, § 7; chapter 48, §§ 22, 114, and chapter 111, §§ 112, 113, made applicable by Act Aug. 18, 1890 (Comp. St. § 6911), to proceedings by the United States for the condemnation of lands, the United States, or either party, may file a petition to determine by jury the value of the land to be condemned, and while the government is given an option to abandon proceedings if it deems the valuation excessive, yet the land so valued must, if taken, unless the parties otherwise agree, be paid for at the value thus fixed, together with the payment of costs and reasonable expenses.—Turner v. Woodard, 537.

EMPLOYERS' LIABILITY ACTS.

See Commerce, ⚷27; Master and Servant, ⚷180, 204, 265, 278, 286, 288, 289; Negligence, ⚷101.

EQUITY.

See Appeal and Error, ⚷1178; Courts, ⚷332, 356; Descent and Distribution, ⚷83; Eminent Domain, ⚷158; Injunction; Judgment, ⚷441; Quieting Title; Specific Performance; Trusts; Waters and Water Courses, ⚷230.

I. JURISDICTION, PRINCIPLES, AND MAXIMS.

(C) Principles and Maxims of Equity.

⚷66 (U.S.C.C.A.Mass.) Where all of the parties interested in the proceeds resulting from the condemnation by the United States of land, title to which stood in the name of one who before end of the proceedings became a bankrupt, agreed that on payment of the value as fixed by the jury, the court should decide the equities, *held* that, as the proceeding had to be treated as an equitable one, or the parties would be out of court, the maxim, "He who seeks equity must do equity," is applicable to all.—Turner v. Woodard, 537.

VII. DISMISSAL BEFORE HEARING.

⚷359 (U.S.C.C.A.Ohio) Where no claim has been made for cross-relief, plaintiff has an absolute right to dismiss his bill without prejudice at any time before the case is ripe for decision, if not later, and the expense incurred by defendant in preparing for trial, and the resulting delay, do not alone constitute good cause for refusing such dismissal.—Lindley v. Denver, 151.

Case wherein plaintiff asked leave to dismiss the bill, without prejudice, which was denied, and the bill dismissed absolutely, *held* not within any exception to the rule of right to dismiss without prejudice concerning cases which are ripe for decision and where there is proof before the court to justify dismissal on the merits, so that it is too late for a voluntary dismissal without prejudice.—Id.

In view of the peculiar facts in a daughter's suit for rescission of settlement of her mother's estate, *held*, that the trial court would have been justified, if such course had appealed to its discretion, in delaying decision of plaintiff's motion for dismissal without prejudice until defendants might have had opportunity to make any cross-claim if they promptly exercised the privilege.—Id.

⚷365 (U.S.C.C.A.Ohio) Though the circumstances tended to persuade the trial court that plaintiff's suit for rescission of a settlement of her mother's estate was not prosecuted in good faith, but vexatiously, in the absence of issue upon or trial of the claim of bad faith, final dismissal of the bill on the merits cannot be supported on such ground; plaintiff having had prima facie an absolute right to dismiss without prejudice, as she asked leave.—Lindley v. Denver, 151.

EQUITY RULES.

See Court Rules Cited.

ERROR, WRIT OF.

See Appeal and Error.

ESPIONAGE ACT.

See Army and Navy, ⚷40; Criminal Law, ⚷315, 371, 812; War, ⚷4.

ESTATES.

See Descent and Distribution; Wills.

ESTOPPEL.

See Judgment, ⚷675; Patents, ⚷129; Principal and Agent, ⚷137.

III. EQUITABLE ESTOPPEL.

(A) Nature and Essentials in General.

⚷62(6) (U.S.C.C.A.Colo.) An irrigation district which has sold bonds and expended the proceeds in execution of a contract for an irrigation system which is nearly completed is estopped to set up the invalidity of the contract in a suit by its bondholders to require it to complete the contract.—Gas Securities Co. v. Antero & Lost Park Reservoir Co., 399.

(B) Grounds of Estoppel.

⚷79 (U.S.C.C.A.Mass.) In a contest between various claimants of a fund arising out of condemnation by the United States of land, title to which stood in the name of one who before

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end of proceedings became a bankrupt, *held*, on the peculiar facts in this case, that the various parties, who signed an agreement that the money should be deposited in court and distributed, were estopped from denying the right of the attorneys for the bankrupt to recover for their disbursements and services which resulted in obtaining an increased valuation.—Turner v. Woodard, 537.

⚷95 (U.S.C.C.A.Ohio) If the owner of a patent knew that his licensee deemed the contract between them ended not later than the end of a royalty period to which his suit for royalties was directed, and realized that a demand by him for royalties would bring a cancellation by the licensee under another clause of the contract, and nevertheless kept silent for the longest period permitted by the statute of limitations, he would be estopped to insist that there had been no effectual cancellation by the licensee.—Computing Scale Co. v. Barnard Co., 318.

EVIDENCE.

See Criminal Law, ⚷315–559; Witnesses.

For evidence as to particular facts or issues or in particular actions or proceedings, see also the various specific topics.

For review of rulings relating to evidence, see Appeal and Error.

I. JUDICIAL NOTICE.

⚷37 (U.S.C.C.A.Canal Zone) In an action for an injury occurring in the republic of Panama, refusal to direct a verdict for defendant on the ground that no evidence was introduced of the law of Panama *held* error.—Panama Electric Co. v. Moyers, 287.

II. PRESUMPTIONS.

⚷73 (U.S.C.C.A.Ohio) A corporation which owned all of the stock of another corporation cannot complain of the presumption that it duly performed its duty as to management.—Toledo & C. R. Co. v. Cincinnati, I. & W. R. Co., 613.

⚷75 (U.S.C.C.A.W.Va.) That the party whose case is a denial, with the burden of proof resting upon his opponent, does not produce evidence within his reach, affords no ground for inference against him on the issue.—Owens Bottle-Mach. Co. v. Kanawha Banking & Trust Co., 638.

III. BURDEN OF PROOF.

⚷91 (U.S.C.C.A.Okl.) An affirmative claim must be proved by the party who seeks its benefit.—Barnett v. Kunkel, 370.

XIV. WEIGHT AND SUFFICIENCY.

⚷596(1) (U.S.C.C.A.Mich.) In a civil action, proof need not be beyond all possible doubt, but a preponderance of the evidence, or a showing of a greater probability, is all that is required.—Chicago, D. & G. B. Transit Co. v. Moore, 466.

EXCEPTIONS, BILL OF.

See Courts, ⚷356; Criminal Law, ⚷1090, 1091.

EXCHANGES.

See Carriers, ⚷59.

EXCLUSION ACT.

See Aliens, ⚷32.

EXECUTION.

See Bankruptcy, ⚷188.

EXECUTORS AND ADMINISTRATORS.

See Descent and Distribution; Wills.

EXEMPTIONS.

See Master and Servant, ⚷180.

EXPLOSIVES.

See Master and Servant, ⚷153.

FACTORS.

See Brokers.

FEDERAL EMPLOYERS' LIABILITY ACT.

See Commerce, ⚷27; Master and Servant, ⚷180, 204, 265, 278, 286, 288, 289; Negligence, ⚷101.

FEDERAL OPERATION OF RAILROADS.

See Railroads, ⚷5½.

FELLOW SERVANTS.

See Master and Servant, ⚷180–201.

FLYING SWITCH.

See Railroads, ⚷391.

FORESTS.

See Woods and Forests.

FORFEITURES.

See Corporations, ⚷183.

FORGERY.

See Bankruptcy, ⚷164, 166, 303; Indictment and Information, ⚷28.

FRANCHISES.

See Street Railroads, ⚷66.

FRAUD.

See Bankruptcy, ⚷159; Corporations, ⚷183; Criminal Law, ⚷371; Guardian and Ward, ⚷105; Indictment and Information, ⚷121; Judgment, ⚷441, 521; Post Office, ⚷35, 48, 49; Public Lands, ⚷120; Woods and Forests, ⚷8.

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GAS.

See Mines and Minerals, ⚷79, 81.

GENERAL AVERAGE.

See Shipping, ⚷200.

GIFTS.

I. INTER VIVOS.

⚷49(1) (U.S.C.C.A.Mont.) Evidence *held* to sustain a finding that a testatrix at the time of her death owned certain stock, as against the claim of a gift of the same to her son, and that it passed as part of her residuary estate. —Barker v. Edwards, 460.

GOVERNMENT OPERATION OF RAILROADS.

See Railroads, ⚷5½.

GUARANTY.

See Principal and Agent, ⚷123.

GUARDIAN AND WARD.

IV. SALES AND CONVEYANCES UNDER ORDER OF COURT.

⚷81 (U.S.C.C.A.Okl.) The probate court of Oklahoma had jurisdiction to order a sale of land belonging to a minor Choctaw Indian, and the circumstance that the Indian's guardian intended to take property instead of cash for the land, though known to the court, if a violation of the guardian's duty, was not a matter affecting the jurisdiction of the court to make the order of sale and an order confirming it, which orders were not void, but at most voidable.—Penny v. Alliance Trust Co., 520.

⚷105(1) (U.S.C.C.A.Okl.) In suit by the guardian of a minor Choctaw Indian to have his deed covering his ward's land set aside, as obtained by fraud and misrepresentation, a suit to which the mortgagee of the grantee mortgagor was not a party, judgment canceling, setting aside, and vacating the guardian's deed did not relate back, to the prejudice of the innocent mortgagee for value.—Penny v. Alliance Trust Co., 520.

⚷108 (U.S.C.C.A.Okl.) Even where orders of the probate court, for sale of a minor Choctaw Indian's land by his guardian, and confirming sale, are voidable, such action will not be taken to the prejudice of an innocent purchaser for value.—Penny v. Alliance Trust Co., 520.

HABEAS CORPUS.

I. NATURE AND GROUNDS OF REMEDY.

⚷25(1) (U.S.C.C.A.Cal.) Where claim of right under Rev. St. § 1993 (Comp. St. § 3947), to enter the United States, made by appellant, a Chinese person alleging himself to be a citizen, was not first determined by a special board appointed under Act Feb. 20, 1907, appellant is entitled to a writ of habeas corpus, unless within a reasonable time proceedings are instituted against him in accordance with law.—Jeong Quey How v. White, 72.

II. JURISDICTION, PROCEEDINGS, AND RELIEF.

⚷54 (U.S.C.C.A.S.C.) Where a petitioner for writ of habeas corpus is confined under a statute containing a number of provisions, on any one of which he may be detained, the petition must clearly set forth each provision, and must aver that neither of them applies to him.—Hines v. Mikell, 28.

HARMLESS ERROR.

See Appeal and Error, ⚷1050–1060; Criminal Law, ⚷1165–1169.

HARTER ACT.

See Shipping, ⚷196.

HIGH COST OF LIVING.

See Damages, ⚷96.

HIGHWAYS.

See Bankruptcy, ⚷101, 293, 443, 455; Bridges; Counties, ⚷182; Intoxicating Liquors, ⚷236; Railroads, ⚷350.

HOMICIDE.

V. EXCUSABLE OR JUSTIFIABLE HOMICIDE.

⚷112(2) (U.S.C.C.A.Alaska) If defendant, charged with homicide, was attacked in his own cabin by deceased, and forced back to his bunk, and thrown down upon it, and deceased choked him until he was "all in," or had reasonable ground to believe he was going to suffer great bodily harm, and that it was necessary to protect himself, he was justified in using all necessary means, even to the extent of killing deceased, though he, defendant, was wrong in throwing deceased's blankets out of the cabin and ordering him to get out, which started the difficulty.—Huber v. U. S., 566.

VII. EVIDENCE.

(B) Admissibility in General.

⚷192 (U.S.C.C.A.Alaska) In a prosecution for homicide by shooting deceased, who attacked defendant after the latter had ordered deceased out of defendant's cabin after words had passed between them, evidence offered by defendant tending to show a state of ill feeling, which might have existed in the mind of deceased toward defendant during the next to the last month before the killing, *held* admissible on the issue of who was the aggressor in the difficulty. —Huber v. U. S., 566.

VIII. TRIAL.

(C) Instructions.

⚷300(7) (U.S.C.C.A.Alaska) In a prosecution for homicide, instructions that if there was a mutual combat, during which defendant volun-

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tarily shot and killed deceased, the plea of self-defense was not available, and that a mutual combat is one into which both parties willingly enter, *held* erroneous, in view of the testimony, as misleading.—Huber v. U. S., 566.

HUSBAND AND WIFE.

See Aliens, ⚷32; Damages, ⚷130; Witnesses, ⚷52.

VI. ACTIONS.

⚷209(4) (U.S.C.C.A.Mich.) Where a passenger on a steamer contracted typhoid fever as a result of impure drinking water, *held* that he might recover for the value of his wife's services in nursing him.—Chicago, D. & G. B. Transit Co. v. Moore, 466.

IMMIGRATION.

See Aliens, ⚷53, 54.

IMPROVEMENTS.

See Perjury, ⚷19, 25.

INDEMNITY.

See Courts, ⚷342; Insurance, 514.

INDEPENDENT CONTRACTOR.

See Towage, ⚷19.

INDIANS.

See Guardian and Ward, ⚷81, 105, 108; Judgment, ⚷521.

⚷15(1) (U.S.C.C.A.Okl.) A deed by the mother of a minor full-blood Creek Indian, who inherited an allotment of land from her daughter, was of no effect, where approved by the county court of a county of Oklahoma in which the daughter was not a resident when she died; the court not having had jurisdiction.—Barnett v. Kunkel, 370.

Deed of a minor full-blood Creek Indian's allotment of land, inherited by her mother, executed two days before patent for the land was issued, though the selection of the allotment had been legally made and approved before, *held* not void under Act April 26, 1906, § 19, and Act May 27, 1908, § 5, rendering void a deed of lands of the Five Civilized Tribes, if made before the removal of "restrictions"; "restrictions," as used, referring to prohibitions against alienation.—Id.

Where the mother of a minor full-blood Creek Indian inherited her daughter's allotment, and deeded it to another in 1909, the approval of the deed by the county court of the county of Oklahoma where the daughter was resident when she died was not void because not made until 1913; mere lapse of time not destroying the deed or taking away power to approve it. —Id.

Order of the county judge of a county of Oklahoma wherein a minor full-blood Creek Indian was resident when she died, approving deed of the mother of such Indian, who had inherited her allotment, *held* not void because made at the home of the judge, instead of the courthouse, the judge having been ill, or because the term of the county court had adjourned and the adjournment was entered on its records prior to the approval of the deed, while no other term had been legally called, so that the order was entered in vacation.—Id.

INDICTMENT AND INFORMATION.

See Army and Navy, ⚷40; Criminal Law, ⚷628, 829, 878, 984, 1090; Intoxicating Liquors, ⚷223; Monopolies, ⚷31; Perjury, ⚷19, 25, 26; Post Office, ⚷48; War, ⚷4.

III. FORMAL REQUISITES OF INDICTMENT.

⚷28 (U.S.C.C.A.N.Y.) A criminal suit in the federal courts must be brought in the name of the United States and by the United States attorney.—Jacob Hoffman Brewing Co. v. McElligott, 487.

V. REQUISITES AND SUFFICIENCY OF ACCUSATION.

⚷60 (U.S.C.C.A.S.D.) An indictment must allege facts sufficient to constitute the crime charged.—Wolf v. U. S., 364.

⚷110(51) (U.S.C.C.A.Colo.) An indictment for violation of White Slave Traffic Act, § 2 (Comp. St. § 8813), *held* good, where it charged the offense in the language of the statute.—Huffman v. U. S., 35.

⚷121(1) (U.S.C.C.A.Tenn.) In a prosecution for engaging in the retail liquor business without having paid the tax required, refusal of bill of particulars *held* within the discretion of the trial court.—Mayer v. U. S., 284.

⚷121(2) (U. S. C. C. A. Cal.) An indictment charging that defendant devised a scheme and artifice to defraud, and used the mails in connection therewith, *held* to plainly and fairly give defendant information of what he must be prepared to meet, and so he was not entitled to a bill of particulars.—Crane v. U. S., 456.

VII. MOTION TO QUASH OR DISMISS, AND DEMURRER.

⚷154 (U.S.C.C.A.Cal.) Failure to demur to the indictment waives all objections thereto, except the objection that some substantial element of the crime was omitted therefrom.—Berry v. U. S., 271.

XI. WAIVER OF DEFECTS AND OBJECTIONS, AND AIDER BY VERDICT.

⚷203 (U.S.C.C.A.Conn.) Where an indictment contains good and bad counts, a general verdict of guilty will be referred to the good counts, if sustained by the evidence, and the judgment will be affirmed.—Buessel v. U. S., 105.

INFANTS.

See Guardian and Ward; Indians, ⚷15.

INFRINGEMENT.

See Patents, ⚷318.

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INJUNCTION.

See Appeal and Error, ⚷843; Carriers, ⚷18; Patents, ⚷290.

II. SUBJECTS OF PROTECTION AND RELIEF.

(E) Public Officers and Boards and Municipalities.

⚷75 (U.S.C.C.A.N.Y.) Where the Internal Revenue Department refused to license or sell revenue stamps to concerns which it claimed were violating the War-Time Prohibition Act of November 21, 1918, but this refusal was later abandoned, *held* that an acting deputy collector may be enjoined from reverting to the original practice of the department.—Jacob Hoffman Brewing Co. v. McElligott, 487.

(H) Criminal Acts, Conspiracies, and Prosecutions.

⚷105(1) (U.S.C.C.A.N.Y.) A federal district attorney cannot be enjoined from instituting criminal proceedings under the War-Time Prohibition Act of November 21, 1918, against concerns manufacturing and selling nonintoxicating beer, upon the ground that the attorney had transcended his authority by invoking the act against nonintoxicating liquors.—Jacob Hoffman Brewing Co. v. McElligott, 487.

III. ACTIONS FOR INJUNCTIONS.

⚷114(3) (U.S.C.C.A.Colo.) Where a bill asks no relief against a person but that defendants be restrained from interfering with his performance of a contract which it is alleged he is able and willing to perform, he is not a necessary party defendant.—Gas Securities Co. v. Antero & Lost Park Reservoir Co., 399.

INSOLVENCY.

See Bankruptcy.

INSPECTION.

See Maritime Liens, ⚷65; Master and Servant, ⚷180, 204, 235, 278, 289; Trial, ⚷191, 252.

INSTRUCTIONS.

See Criminal Law, ⚷786–829; Trial, ⚷191–260.

INSURANCE.

See Appeal and Error, ⚷237, 1053; Courts, ⚷342.

V. THE CONTRACT IN GENERAL.

(B) Construction and Operation.

⚷146(3) (U.S.C.C.A.Ohio) A policy of insurance should be construed favorably to the insured and against the insurer, if the language leaves the matter in doubt.—Schambs v. Fidelity & Casualty Co. of New York, 55.

XIII. EXTENT OF LOSS AND LIABILITY OF INSURER.

(C) Guaranty and Indemnity Insurance.

⚷514 (U.S.C.C.A.Ohio) Where a policy insuring a surgeon against loss from liability for malpractice, and requiring the insurer to defend, etc., did not use language specifically showing that no action could be maintained thereon until the insured had suffered and paid a judgment, *held*, that the indemnity was not limited merely to sums paid by the surgeon; so, where the surgeon became a voluntary bankrupt after rendition of judgment for malpractice, such judgment constituted a loss within the terms of the policy, and the trustee in bankruptcy might sue for benefit of judgment creditor, who was the sole creditor scheduled.—Schambs v. Fidelity & Casualty Co. of New York, 55.

INSURRECTION.

See Criminal Law, ⚷371, 812; War, ⚷4.

INTEREST.

See Admiralty, ⚷118; Damages, ⚷96; Internal Revenue, ⚷7; Shipping, ⚷183; Usury.

III. TIME AND COMPUTATION.

⚷39(1) (U.S.C.C.A.Va.) In a suit to establish a maritime lien for repairs, interest is properly allowed from the time the work was finished.—The Elizabeth Monroe Smith, 63.

⚷59(1) (U.S.C.C.A.Kan.) The rule of the federal courts in case of partial payments is that interest shall be calculated whenever a payment is made, and the payment first applied to such interest, the balance, if any, to be applied on the principal; if the payment fall short of the interest due the balance of interest is not to be added to the principal so as to produce interest.—Harlan v. Houston, 65.

INTERNAL REVENUE.

See Injunction, ⚷75.

⚷7 (U.S.C.C.A.Cal.) Under Corporation Tax Law of August 5, 1909, providing that interest paid on indebtedness not exceeding paid-up capital stock may be deducted in estimating net income, moneys paid a pipe line corporation by its stockholders *held* not payment for capital stock, but advances to corporation, and corporation, having no paid-up stock, could not deduct interest on such advances in calculating net income.—Associated Pipe Line Co. v. U. S., 94.

⚷9 (U.S.C.C.A.Cal.) A pipe line company organized by, and doing business only for, two other pipe line corporations, *held* not merely a convenient agent of these corporations, but to be doing business for profit within Corporation Tax Law.—Associated Pipe Line Co. v. U. S., 94.

⚷19(1) (U.S.C.C.A.Mass.) Within War Tax Law Oct. 22, 1914, § 5, Schedule A, imposing a stamp tax of 5 cents on each $100 of face value, or fraction thereof, of certificates of stock issued by any association, company, or corporation, such tax must be paid on certificates of shares issued by a manufacturing company organized in the form of a trust under the common law and deriving none of its rights, benefits, or qualifications from any statute, and which was not an ordinary common-law real estate trust; for, if the word "association" be

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not broad enough to include the concern, it is included in the expression "company," while the phrase "certificates of stock" discloses no intent to exclude common-law associations or companies, but evidences a legislative purpose to impose a stamp tax on certificates of stock as muniments of title.—Malley v. Bowditch, 609.

War Tax Law Oct. 22, 1914, § 5, Schedule A, imposing a stamp tax of 5 cents on each $100 of face value, or fraction thereof, of certificates of stock, issued by any company, association, or corporation, is not invalid in its application to a manufacturing company organized as a trust at common law, on the theory that it was inapplicable to other associations, for the taxes were merely on the muniments of title, and if other associations do not issue such muniments of title they are therefore not taxable.—Id.

⚷28 (U.S.C.C.A.Cal.) A statement made by a corporation's auditor to an internal revenue tax agent that the corporation had no paid-up capital stock is admissible in proceedings to recover taxes under Corporation Tax Law of August 5, 1909.—Associated Pipe Line Co. v. U. S., 94.

⚷39, 40 (U.S.C.C.A.Tenn.) To subject a person to conviction for violation of Rev. St. § 3242 (Comp. St. § 5965), by "carrying on the business of a * * * retail liquor dealer" without having paid the special tax a single sale is not sufficient, unless made under circumstances which warrant the inference by the jury that defendant either had liquor on hand, or was ready and able to procure it, for purposes of sale.—Bailey v. U. S., 156.

⚷47 (U.S.C.C.A.S.C.) Evidence *held* sufficient to support a conviction for illicit distilling.—Guignard v. U. S., 61.

⚷47 (U.S.C.C.A.Tenn.) Evidence *held* to warrant defendant's conviction on the charge that he was carrying on a retail liquor business without having paid the required special tax.—Faraone v. U. S., 483.

In a prosecution for carrying on the business of a retail liquor dealer without having paid special federal tax, the refusal of the trial court to allow proffered witnesses to testify as to whether they had ever heard of liquor being sold at defendant's place of business cannot be held error, where the record did not disclose the opportunity such witnesses had for knowing the defendant's reputation or the reputation of his place of business.—Id.

In a prosecution against defendant, a grocer, for carrying on a retail liquor business without paying the special federal tax, a special charge that, if the sales testified to by the prosecuting witness were made by defendant's clerk, it was necessary to prove that the clerk was his agent and acted with his knowledge, was properly refused, for, while defendant could not be convicted on proof of sales made by his clerk without his knowledge, yet the vital question in the case was not whether any particular sales were made, but whether defendant was carrying on the business of retail liquor dealer without payment of the special tax, and hence the request was predicated on a false issue.—Id.

INTERNATIONAL LAW.

⚷10 (U.S.C.C.A.N.Y.) A vessel owned and operated by a foreign sovereign is exempt from seizure on process in rem from an admiralty court of the United States.—The Carlo Poma, 345.

INTOXICATING LIQUORS.

See Conspiracy, ⚷28; Criminal Law, ⚷330, 369, 418, 420, 535, 628, 683; Indictment and Information, ⚷121; Injunction, ⚷75, 105; Internal Revenue, ⚷39, 40, 47; States, ⚷12.

VI. OFFENSES.

⚷132 (U.S.C.C.A.Tenn.) To render the Reed Amendment (Act March 3, 1917, § 5 [Comp. St. 1918, §§ 8739a, 10387a–10387c]), prohibiting the transportation of liquor in interstate commerce, except for certain purposes, into any state "the laws of which prohibit the manufacture or sale therein," of liquors for beverage purposes, applicable to a state, it must have adopted a general policy of prohibition throughout its territory; but it is not essential that such prohibition should be literally without exception.—Laughter v. U. S., 162.

Under various statutes of Tennessee, taken together, both the sale and the manufacture of liquor for sale as a beverage are prohibited throughout the state, and the transportation of liquor into the state for beverage purposes is in violation of the Reed Amendment (Comp. St. 1918, §§ 8739a, 10387a–10387c).—Id.

⚷134 (U.S.C.C.A.N.Y.) The War-Time Prohibition Act of November 21, 1918, prevents only the manufacture and sale of beer, wine, etc., which is in fact intoxicating.—Jacob Hoffman Brewing Co. v. McElligott, 487.

⚷138 (U.S.C.C.A.Tenn.) Relative to transporting liquor into a prohibition state in violation of Act March 3, 1917, § 5 (Comp. St. 1918, § 8739a), defendant having actually transported whisky in his boat across the state line in Mississippi into Tennessee, and with intent that it should finally remain in that state, it was immaterial that he had incidentally gone out again with his boat and cargo, or that he was outside it when arrested.—Bishop v. U. S., 263.

⚷138 (U.S.C.C.A.Tenn.) It is not a violation of the Reed Amendment (Comp. St. 1918, § 8739a) to carry intoxicating liquors from a state in which sale was allowed across a state in which sale was prohibited, where the liquor was destined for a third state in which sale was permitted.—Berryman v. U. S., 276.

⚷169 (U.S.C.C.A.Tenn.) In a prosecution for engaging in the retail liquor business without having paid the required tax, requested charge that, if the jury found a sale of the business by one defendant had been made in good faith, so that he was acting as a clerk only, he should be acquitted, *held* properly denied, since in spite of such a good-faith sale he might have been guilty, through the effect of Penal Code, § 332 (Comp. St. § 10506).—Mayer v. U. S., 284.

VIII. CRIMINAL PROSECUTIONS.

⚷223(2) (U.S.C.C.A.Tenn.) Variance between indictment for transporting liquor into a prohibition state, charging transportation to a certain point therein, and proof that defendant's journey ended two or three miles short

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of that point, he being arrested on his journey, was immaterial.—Bishop v. U. S., 263.

⚷229 (U.S.C.C.A.Tenn.) Testimony that the owner of whisky was expected, by those taking it by boat from Missouri down the Mississippi, to meet them at one of two points in Tennessee, with two trucks on which to unload it, was evidence that it was intended for transportation into Tennessee, for permanent stay there, in violation of act March 3, 1917, § 5 (Comp. St. 1918, § 8739a).—Bishop v. U. S., 263.

⚷236(1) (U.S.C.C.A.Tenn.) Proof that defendants loaded liquor into an automobile in Mississippi, and had carried it across into Tennessee, along the highway to Memphis, when arrested, *held* sufficient to sustain a conviction for violation of the Reed Amendment, although in following the road they were about to cross the line again into Mississippi; there being evidence to warrant a finding that their intended destination was Memphis.—Jones v. U. S., 172.

⚷236(1) (U.S.C.C.A.Tenn.) Evidence *held* to support conclusion that defendant had actually transported liquor across the state line in the Mississippi into Tennessee, and with intent that it should finally remain there.—Bishop v. U. S., 263.

⚷236(1) (U.S.C.C.A.Tenn.) In a prosecution for violating the Reed Amendment (Comp. St. 1918, § 8739a), brought against defendants, who claimed that the whisky which they procured in Kentucky and transported into Tennessee was destined for Arkansas, evidence *held* sufficient to sustain a conviction.—Berryman v. U. S., 276.

JEWS.

See Criminal Law, ⚷723.

JUDGES.

See Criminal Law, ⚷762; Indians, ⚷15.

JUDGMENT.

See Criminal Law, ⚷683.

For judgments in particular actions or proceedings, see also the various specific topics.

For review of judgments, see Appeal and Error.

X. EQUITABLE RELIEF.

(A) Nature of Remedy and Grounds.

⚷441 (U.S.C.C.A.Okl.) A court of equity has jurisdiction to set aside judgments obtained by fraud or collusion.—Barnett v. Kunkel, 370.

XI. COLLATERAL ATTACK.

(C) Proceedings.

⚷521 (U.S.C.C.A.Okl.) In suit to quiet title to land formerly the allotment of a minor full-blood Creek Indian, who died, so that the land was inherited by her mother, a defendant who conveyed it to plaintiffs' predecessor, in view of defendants' cross-bill and offer of proof showing that the mother's attorney, while purporting to act for her in securing the approval of her deed, and in causing decree to be entered in her suit for cancellation against the grantee, forever barring her right, was in fact acting on behalf of the grantee's successor, etc., *held*, that a summary disposition of the case by entry of decree for plaintiffs and dismissal of the cross-bill on the merits was improper it being the duty of the court to hear defendants' proofs; the cross-bill not constituting a collateral attack on the order of the county court of Oklahoma approving the mother's deed, but standing as an original bill to set aside for fraud the order approving the deed.—Barnett v. Kunkel, 370.

XIV. CONCLUSIVENESS OF ADJUDICATION.

(A) Judgments Conclusive in General.

⚷654 (U.S.C.C.A.Ky.) Dismissal on the merits of a bill to remove cloud from title must be taken as an implied holding that plaintiffs' possession, essential to maintenance of the bill, had been sufficiently made out; as otherwise dismissal should be for want of possession, without prejudice.—Rowe v. Kidd, 195.

(B) Persons Concluded.

⚷675(1) (U.S.C.C.A.Ky.) One is not estopped by judgment by assuming defense of the suit, his action in that regard not being open and known to plaintiff.—Rowe v. Kidd, 195.

⚷675(2) (U.S.C.C.A.Ky.) R., grantee by unrecorded deed from A., was not estopped by judgment for plaintiff in action against A. to quiet title with warning order against R., resident of another state, though A.'s attorney without authority and unknown to R. filed answer in name of R. as well as A.; the general attorneys of R. having objected and been assured answer in R.'s name would be withdrawn, though not having seen to the carrying out of the promise, which was not done.—Rowe v. Kidd, 195.

JUDICIAL SALES.

See Guardian and Ward, ⚷81, 108; Mortgages, ⚷497.

JURY.

See Criminal Law, ⚷419, 420, 862; Trial, ⚷177.

LABOR DISPUTES.

See Criminal Law, ⚷423.

LANDLORD AND TENANT.

See Bankruptcy, ⚷255, 467; Mines and Minerals, ⚷79, 81.

II. LEASES AND AGREEMENTS IN GENERAL.

(B) Construction and Operation.

⚷44(1) (U.S.C.C.A.Ky.) A covenant that a lessee will do one thing or will do another thing may impose a binding obligation, although in the alternative, and does not necessarily import any fatally optional or unilateral character, and is not inappropriate to lease which grants a vested interest; but a lease which does not take effect unless the lessee does a certain act is only executory, and is inoperative if the condition is not performed.—Hopkins v. Zeigler, 43.

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VIII. RENT AND ADVANCES.

(A) Rights and Liabilities.

⚷213(1) (U.S.C.C.A.P.R.) The obligation to pay rent at the tenant's domicile, imposed by Civ. Code Porto Rico, § 1139, when the place of payment is not specified in the lease, is subject to the implied condition that the landlord, either in person or by agent, is present to receive payment, and where the landlord or agent is not present to receive payment, the tenant is not obligated to deposit the rental in court, under the provisions of section 1144 et seq.—Central Vannina v. Lopez, 266.

LARCENY.

See Receiving Stolen Goods.

LEASE.

See Landlord and Tenant.

LICENSES.

See Criminal Law, ⚷330, 628; Estoppel, ⚷95; Indictment and Information, ⚷121; Injunction, ⚷75; Internal Revenue, ⚷47; Intoxicating Liquors, ⚷169; Maritime Liens, ⚷65; Patents, ⚷129, 209, 211, 212, 219.

LIENS.

See Attorney and Client, ⚷175; Bankruptcy, ⚷184, 188, 210; Chattel Mortgages; Courts, ⚷359; Maritime Liens; Waters and Water Courses, ⚷230.

LIGHTS.

See Collision, ⚷75.

LIMITATION OF ACTIONS.

See Adverse Possession; Criminal Law, ⚷149; Estoppel, ⚷95.

II. COMPUTATION OF PERIOD OF LIMITATION.

(H) Commencement of Action or Other Proceeding.

⚷127(18) (U.S.C.C.A.Neb.) Where plaintiff filed an amended petition sounding in tort, although original action was in contract, *held* that, where defendant promptly moved to strike amended petition from record on ground that it set up a different cause of action, and plaintiff thereafter was granted leave to withdraw amended petition, defendant cannot defeat recovery on ground that filing of amended petition was an abandonment of original cause of action, which permitted the statute of limitations to operate against original cause and bar it.—Bacon v. Ward, 522.

LOGS AND LOGGING.

See Mortgages, ⚷497.

MANUFACTURES.

See Carriers, ⚷189; Patents, ⚷8, 211, 219.

MARITIME LIENS.

See Interest, ⚷39.

III. ENFORCEMENT.

(A) In Admiralty.

⚷65 (U.S.C.C.A.N.Y.) Evidence that a boiler was inspected and licensed after being repaired, etc., *held* to establish that libelant repaired boiler in a workmanlike manner, although it subsequently developed leaks and defects.—The Cornelia, 124.

⚷65 (U.S.C.C.A.Va.) Evidence *held* to sustain a decree establishing a maritime lien for repairs under Act June 23, 1910, § 1 (Comp. St. § 7783).—The Elizabeth Monroe Smith, 63.

MARRIAGE.

See Husband and Wife.

MASTER AND SERVANT.

See Appeal and Error, ⚷237, 1053; Commerce, ⚷27; Corporations, ⚷308; Criminal Law, ⚷1030, 1048; Damages, ⚷216; Monopolies, ⚷12; Negligence, ⚷101; Shipping, ⚷81, 64; Trial, ⚷191, 248, 252, 253.

III. MASTER'S LIABILITY FOR INJURIES TO SERVANT.

(B) Tools, Machinery, Appliances, and Places for Work.

⚷105(3) (U.S.C.C.A.N.Y.) There was no negligence of the master in having in use a float on which cars were run, with a stanchion near the side of the cars; the distance being that customary in floats of the kind.—Pennsylvania R. Co. v. Nelson, 224.

⚷128 (U.S.C.C.A.Md.) A stevedoring company, employed to load a ship which had the choice of using a steam winch or a spool, both furnished by the ship for lowering cargo into the holds, used the spool, which was not intended for such heavy weights, *held* liable for the death of an employé killed by the falling of a slingload, owing either to the inability of the man at the ship end of the rope to hold it or to some defect of the spool head, which, if it existed, was obvious.—Atlantic Transport Co. v. State of Maryland, 23.

(C) Methods of Work, Rules, and Orders.

⚷137(6) (U.S.C.C.A.N.Y.) Ordinarily it is not negligent for a switching engine in a railroad yard not to give warning by bell or whistle to employés familiar with the operation of the yard.—Lehigh Valley R. Co. v. Scanlon, 205.

(D) Warning and Instructing Servant.

⚷153(2) (U.S.C.C.A.N.Y.) A railroad company, which placed a young man in charge of the operation of a gasoline pumping engine, of which he had no knowledge or experience, without instruction or warning as to the danger, *held* chargeable with negligence, which rendered it liable for his injury by an explosion of vapor from the engine.—Erie R. Co. v. Collins, 240.

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(E) Fellow Servants.

⚷180(4) (U.S.C.C.A.Cal.) Federal Employer's Liability Act (Comp. St. §§ 8657–8665), making interstate carrier liable for injury to employé resulting from negligence of an officer, agent of employé, renders it liable for negligence of fellow servant in prosecution of its business.—San Pedro, L. A. & S. L. R. Co. v. Brown, 100.

⚷180(5) (U.S.C.C.A.Cal.) Though under rules of interstate carrier it is the duty of inspectors to put signal on train to indicate it is being inspected, one of two inspectors working together, by relying on the other to place such signal, does not make him his agent; with the result of absolving the carrier from liability under federal Employers' Liability Act (Comp. St. §§ 8657–8665) for his injury through negligent failure of the other to place the signal, but such negligence is attributable to the carrier; section 5 of the act declaring void, pro tanto, any contract or rule the purpose or intent of which is to enable the carrier to exempt itself from liability under the act.—San Pedro, L. A. & S. L. R. Co. v. Brown, 100.

⚷201(3) (U.S.C.C.A.Va.) Where plaintiff employé was not operating the machine which caused his injury, defendant employer is liable for its own negligence, although certain of its repairmen may also have been negligent and contributed to plaintiff's injury.—American Locomotive Co. v. Thornton, 381.

Plaintiff employé's recovery for personal injuries cannot be defeated because repairmen performing a nonassignable duty of defendant employer were negligent.—Id.

(F) Risks Assumed by Servant.

⚷204(3) (U.S.C.C.A.Cal.) A car inspector of an interstate carrier, who trusts to another inspector working with him to put on a train a signal indicating that it is being inspected, and goes on with his work unaware of the other's failure to do so, does not, under the federal Employers' Liability Act (Comp. St. §§ 8657–8665), assume the risk of such negligence of the other. —San Pedro, L. A. & S. L. R. Co. v. Brown, 100.

⚷217(1) (U.S.C.C.A.N.Y.) A servant does not assume risks due to the negligence of his employer and fellow employés, unless they are obvious or fully known and appreciated by him. —Erie R. Co. v. Collins, 240.

⚷217(5) (U.S.C.C.A.N.Y.) The risk of nearness to cars of a stanchion on a float is assumed by railroad employé who for three months, charging him with knowledge of the situation, without objection, continued to load cars on it and other like floats.—Pennsylvania R. Co. v. Nelson, 224.

⚷217(29) (U.S.C.C.A.N.Y.) An employé does not assume a risk due to the negligence of his fellow employés, unless he is aware of it, or the risk is so obvious that an ordinarily prudent person would know and appreciate it. —Lehigh Valley R. Co. v. Scanlon, 205.

⚷219(1) (U.S.C.C.A.N.Y.) Plaintiff assumes the risk of negligence upon the part of his fellow employés, if the danger be so obvious that an ordinarily prudent person would have observed and appreciated it.—Central R. Co. of New Jersey v. Sharkey, 212.

⚷226(1) (U.S.C.C.A.Va.) An employé assumes only risks incident to his employment, and does not assume those caused by his employer's negligence.—American Locomotive Co. v. Thornton, 381.

(G) Contributory Negligence of Servant.

⚷235(7) (U.S.C.C.A.Va.) An employé may assume that his employer has provided, and is maintaining, safe machinery and appliances.—American Locomotive Co. v. Thornton, 381.

Plaintiff employé, who was not required to inspect or repair his employer's machinery, is not precluded from recovering for personal injuries because he failed to discover defects which were observable only after close examination. —Id.

⚷243(3) (U.S.C.C.A.Cal.) While it is the duty of an employé to observe rules promulgated by the employer, yet, there being evidence of a custom with respect to the interpretation of a rule which does not clearly cover the particular situation which confronts the employé, the employé is not always negligent in following the custom.—San Pedro, L. A. & S. L. R. Co. v. Brown, 100.

(H) Actions.

⚷265(4) (U.S.C.C.A.N.Y.) Evidence that a car repairer in a New Jersey railroad yard had been told that a Pennsylvania railroad car, which he had been instructed to repair, was "a rush car for Philadelphia," etc., *held* to make a prima facie showing that the car was employed in interstate commerce, within the Employers' Liability Act (Comp. St. §§ 8657–8665).—Central R. Co. of New Jersey v. Sharkey, 212.

⚷278(5) (U.S.C.C.A.Va.) Evidence that a defective unguarded machine broke a tool as plaintiff employé was passing by, that part of such tool struck him in the eye, that tools did not break if the machine was in proper condition, and that no inspection was made of the machines, etc., *held* to sustain a verdict that defendant employer was negligent.—American Locomotive Co. v. Thornton, 381.

⚷278(6) (U.S.C.C.A.N.J.) In an action under federal Employers' Liability Act 1908, as amended (Comp. St. §§ 8657–8665), for injuries from failure to provide a workable coupler as required by Safety Appliance Act of March 2, 1893, as amended by Act April 1, 1896, and Act March 2, 1903 (Comp. St. §§ 8605–8615), evidence of repeated and unsuccessful efforts by an experienced railroad man to operate the lever of an automatic coupler, when there are no circumstances consistent with its being in repair and workable condition to explain the inability to successfully operate it, is sufficient, without other evidence of its defective condition, to permit the inference that the coupler was defective.—Philadelphia & R. Ry. Co. v. McKibbon, 452.

⚷285(7) (U.S.C.C.A.N.Y.) Circumstantial evidence in action for death of a railroad employé, killed while engaged in loading cars in interstate commerce on a float, *held* insufficient to go to the jury; it making it a matter of speculation whether accident occurred by reason of a coil of rope negligently placed on the incline approach of a platform, or through nearness to

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cars of stanchion of platform, an assumed risk. —Pennsylvania R. Co. v. Nelson, 224.

⚷286(32) (U.S.C.C.A.N.Y.) In action under Employers' Liability Act (Comp. St. §§ 8657–8665), evidence that plaintiff car repairer was injured by a locomotive operated at a rapid rate of speed for a railroad yard, that it was hidden behind a smoke screen and gave no warning of its approach, etc., *held* to make defendant railroad's negligence a jury question. —Central R. Co. of New Jersey v. Sharkey, 212.

⚷286(33) (U.S.C.C.A.N.Y.) In action under Employers' Liability Act (Comp. St. §§ 8657–8665), evidence that plaintiff switch tender was injured by a freight engine just after passing through a string of cars which, contrary to a posted rule, etc., obstructed his passageway, made defendant's negligence in not providing a safe passageway a jury question.—Lehigh Valley R. Co. v. Scanlon, 205.

In action under Employers' Liability Act (Comp. St. §§ 8657–8665), evidence that a freight engine was unexpectedly operated without warning on a track next to which stood a string of cars through which it was known plaintiff switch tender would have to pass to perform his duties, *held* to make defendant's negligence in so operating the freight engine a jury question.—Id.

In such case, evidence *held* to make defendant's negligence, in not keeping a lookout on the engine, a jury question.—Id.

⚷288(3) (U.S.C.C.A.N.Y.) In action under Employers' Liability Act (Comp. St. §§ 8657–8665), evidence that plaintiff switch tender was injured by a freight engine just after passing between a string of cars which obstructed his passageway, etc., *held* to make his assumption of risk a jury question.—Lehigh Valley R. Co. v. Scanlon, 205.

⚷288(3) (U.S.C.C.A.N.Y.) In action under Employers' Liability Act (Comp. St. §§ 8657–8665), evidence that plaintiff car repairer was hit from behind by rapidly approaching locomotive, while avoiding an engine proceeding in the opposite direction on another track, etc., made his assumption of risk a jury question.—Central R. Co. of New Jersey v. Sharkey, 212.

⚷289(23) (U.S.C.C.A.Va.) In a servant's personal injury action, an instruction that plaintiff could recover if machine which caused a tool to break was in bad condition through defendant's negligence, and if it was not plaintiff's duty to inspect or repair machine, and if he did not know of its defects until he was passing it, etc., *held* proper under the facts.—American Locomotive Co. v. Thornton, 381.

⚷289(30) (U.S.C.C.A.N.Y.) In action under Employers' Liability Act (Comp. St. §§ 8657–8665), evidence that plaintiff switch tender was hit by a freight engine just after passing between a string of cars which obstructed his passageway, etc., made his contributory negligence a jury question.—Lehigh Valley R. Co. v. Scanlon, 205.

⚷289(35) (U.S.C.C.A.Cal.) Considering evidence of practice followed by inspectors, *held*, it could not be said, as matter of law, that it was incumbent on an inspector, working under a train and injured by the moving thereof, to make sure that his fellow inspector actually placed thereon the signal to indicate that it was being inspected.—San Pedro, L. A. & S. L. R. Co. v. Brown, 100.

⚷293(2) (U.S.C.C.A.Va.) Evidence in employé's personal injury case *held* to authorize instructions that it was defendant employer's duty to exercise reasonable care in providing a safe place to work, to furnish safe appliances, competent employés, proper inspectors, and that it was charged with notices of defects it might have discovered with ordinary care.—American Locomotive Co. v. Thornton, 381.

⚷293(11) (U.S.C.C.A.Va.) In a servant's personal injury action, an instruction respecting the care required of defendant employer in protecting its machines, etc., *held* proper.—American Locomotive Co. v. Thornton, 381.

⚷294(8) (U.S.C.C.A.Va.) In servant's action for personal injuries, an instruction that an employer, failing to perform a personal and nonassignable duty, was liable although a fellow servant's negligence also contributed to the injury, *held* proper.—American Locomotive Co. v. Thornton, 381.

⚷295(9) (U.S.C.C.A.Va.) In a servant's personal injury action, instruction that an employé does not assume risk of an unsafe place while reasonably relying upon his employer's promise to remedy conditions *held* supported by the evidence.—American Locomotive Co. v. Thornton, 381.

MILITARY LAW.

See Army and Navy.

MINES AND MINERALS.

See Corporations, ⚷183.

II. TITLE, CONVEYANCES, AND CONTRACTS.

(C) Leases, Licenses, and Contracts.

⚷79(6) (U.S.C.C.A.Ky.) A Kentucky oil and gas lease construed, and a provision that "second party agrees to complete a well on the premises within one year * * * unless the lessee thereafter pays a rental * * * payable quarterly in advance, until a well is completed, * * * which payments shall fully and completely extend this lease," *held* to state alternative conditions, a failure to comply with which, in view of the decisions of the highest court of the state, terminated all interest of lessee at the end of the first year.—Hopkins v. Zeigler, 43.

⚷81 (U.S.C.C.A.Ky.) A second lessee, who took an oil and gas lease with knowledge of a prior unrecorded lease, but which he was told by lessor had expired for failure to do development work, which was the fact, and who expended $4,000 in developing the property within three months, *held* to have not only the superior title, but equities not inferior to those of the first lessees, who through mischance failed to make a payment which would have extended their lease.—Hopkins v. Zeigler, 43.

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MONOPOLIES.

See Criminal Law, ⚷149, 423; Statutes, ⚷225; Street Railroads.

II. TRUSTS AND OTHER COMBINATIONS IN RESTRAINT OF TRADE.

⚷12(2) (U.S.C.C.A.Ill.) Evidence that employers agreed to increase wages if employés prevented any but union switchboards being used in Chicago, that employés accomplished such result by boycotting concerns using switchboards manufactured in other places, etc., *held* to sustain a conviction of both employers and employés for violating the Sherman Anti-Trust Act.—Boyle v. U. S., 603.

⚷12(2) (U.S.C.C.A.Pa.) A combination between members of a tile dealers' association to exclude trade competitors from membership and to make it impossible for them to obtain tiles or tile setters by refusing to buy tiles from manufacturers, most of whom are located in other states, who sold to such competitors, and by an agreement with the tile setters' union that the latter would not allow its members to work for nonmembers of the association, *held* to directly affect interstate commerce, in violation of Sherman Anti-Trust Act, § 1 (Comp. St. § 8820).—Belfi v. U. S., 622.

⚷17(2) (U.S.C.C.A.Mass.) A buyer's covenant not to sell patterns, except those of seller, during term of a sales contract *held* to violate the Clayton Act Oct. 15, 1914, § 3 (Comp. St. § 8835c).—Standard Fashion Co. v. Magrane Houston Co., 593.

⚷29 (U.S.C.C.A.Ill.) Where defendants combined to prevent certain electrical appliances from being transported to Chicago, the mere fact that they intended to accomplish this result by interfering with the installation of the apparatus in Chicago does not relieve the offense of its interstate character so as to preclude prosecution under the Sherman Anti-Trust Act.—Boyle v. U. S., 603.

⚷31 (U.S.C.C.A.Ill.) An indictment under section 1 of the Sherman Anti-Trust Act (Comp. St. § 8820) need not set forth the means by which the conspiracy was accomplished where the object itself was unlawful.—Boyle v. U. S., 603.

In a prosecution under the Sherman Anti-Trust Act, there is no variance between an indictment that defendants combined to prevent the installation of any electrical appliances not manufactured by them in a certain city, and proof that the combination related only to certain specified appliances.—Id.

MOOT CASE.

See Appeal and Error, ⚷843.

MORTGAGES.

See Chattel Mortgages; Courts, ⚷312, 365; Guardian and Ward, ⚷105; Railroads, ⚷144; Trusts, ⚷84.

X. FORECLOSURE BY ACTION.

(I) Judgment or Decree and Execution.

⚷497(2) (U.S.C.C.A.S.C.) Where the grantee of mortgaged timber rights participated with the mortgagor in the foreclosure proceedings, and secured a postponement of the sale, it cannot avoid the binding effect of the foreclosure upon the ground that it was not made a party defendant.—Deer Island Lumber Co. v. Savannah Timber Co., 79.

MOTIONS.

See Criminal Law, ⚷1044.

MOTOR BOAT.

See Collision, ⚷11.

MUNICIPAL CORPORATIONS.

See Bridges, ⚷39; Carriers, ⚷18; Counties.

NAVIGABLE WATERS.

See Criminal Law, ⚷862; Intoxicating Liquors, ⚷138; States, ⚷12.

I. RIGHTS OF PUBLIC.

⚷20(2) (U.S.C.C.A.N.C.) The official approval by the government of the construction of a bridge is conclusive that the bridge was a lawful structure, though it interfered with navigation.—Wilmington Ry. Bridge Co. v. Franco-Ottoman Shipping Co., 234.

NEGATIVE EVIDENCE.

See Criminal Law, ⚷400.

NEGLIGENCE.

See Bridges, ⚷39; Collision, ⚷71, 73–75, 78, 123, 144, 145; Death, ⚷99; Master and Servant, ⚷105–295; Railroads, ⚷307–391; Shipping, ⚷84, 86; Towage, ⚷19.

III. CONTRIBUTORY NEGLIGENCE.

(D) Comparative Negligence.

⚷101 (U.S.C.C.A.Cal.) By express provision of federal Employers' Liability Act (Comp. St. §§ 8657–8665), contributory negligence of employé of interstate carrier merely mitigates damages, and does not bar recovery.—San Pedro, L. A. & S. L. R. Co. v. Brown, 100.

⚷101 (U.S.C.C.A.N.Y.) In action under the Employers' Liability Act (Comp. St. §§ 8657–8665), plaintiff's contributory negligence does not defeat his cause of action, but only decreases the damages.—Lehigh Valley R. Co. v. Scanlon, 205.

⚷101 (U.S.C.C.A.N.Y.) Plaintiff's contributory negligence does not bar his right to recover under the Employers' Liability Act (Comp. St. §§ 8657–8665), but only diminishes the amount of his damages.—Central R. Co. of New Jersey v. Sharkey, 212.

IV. ACTIONS.

(B) Evidence.

⚷134(3) (U.S.C.C.A.Mo.) Evidence that a candy counter in defendant's store was placed near the head of a stairway, and that a bin thereon was filled so high that some pieces spilled on the stairway, upon one of which plaintiff

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stepped and was injured, *held* insufficient to establish defendant's negligence; there being no evidence that its employés habitually spilled candy, or that they knew of it in this instance. —Emerson v. S. S. Kresge Co., 274.

NEW TRIAL.

See Criminal Law, ⚷910–956; Damages, ⚷96.

NOTICE.

See Bankruptcy, ⚷166; Carriers, ⚷59; Damages, ⚷62; Master and Servant, ⚷293; Patents, ⚷211; Pledges, ⚷42, 44; Sales, ⚷84.

NURSES.

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OATH.

See Perjury, ⚷19.

OFFICERS.

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OIL.

See Mines and Minerals, ⚷79, 81.

PANAMA.

See Evidence, ⚷37.

PARENT AND CHILD.

See Descent and Distribution, ⚷83; Guardian and Ward; Indians, ⚷15.

PARTIES.

For parties on appeal and review of rulings as to parties, see Appeal and Error.
For parties to particular proceedings or instruments, see also the various specific topics.

PARTNERSHIP.

See Bankruptcy, ⚷20, 288, 309, 351.

PATENTS.

See Estoppel, ⚷95; Public Lands, ⚷186.

I. SUBJECTS OF PATENTS.

⚷1 (U.S.C.C.A.Mich.) A patent is not inherently the grant of a right to make; it is a grant of the right to exclude others from the field.—Bird's-Eye Veneer Co. v. Franck-Philipson & Co., 334.

⚷8 (U.S.C.C.A.Ohio) The invention of a new and useful product or article of manufacture may have a patent covering it and giving a monopoly upon it, regardless of great variations in the method of making.—Dunn Wire-Cut Lug Brick Co. v. Toronto Fire Clay Co., 326.

In the ordinary and typical case, the method of manufacture and the product manufactured are separable inventions supporting separate patents, one of which may be valid and the other not.—Id.

II. PATENTABILITY.

(A) Invention.

⚷16 (U.S.C.C.A.Ind.) Invention cannot be made to depend upon the length of the advancing step in the art; but if the step be an advance, and the means by which the advance is made are new and beyond the conception of a mechanic trained in the art, invention must be recognized.—Superior Mach. Tool Co. v. Cincinnati Lathe & Tool Co., 341.

⚷36 (U.S.C.C.A.Ohio) Though brick of a certain type, which have gone on the market and had a large sale, are the product of the patentee's patented machine, which has been manufactured by him and sold to brickmakers, such credit and such presumption of inventive novelty as arise from public use should be given to the product, the bricks, and not to the machine.—Dunn Wire-Cut Lug Brick Co. v. Toronto Fire Clay Co., 326.

V. REQUISITES AND VALIDITY OF LETTERS PATENT.

⚷116 (U.S.C.C.A.Ohio) While no hard and fast formula need be given, and experimentation may be necessary to get the best results, the disclosure in a process patent must be sufficient to enable those ordinarily skilled in the art to produce the substantial result desired.—Featheredge Rubber Co. v. Miller Rubber Co., 527.

⚷129 (U.S.C.C.A.Colo.) That a defendant made infringing articles in the belief that it had a valid license, which was in fact void, and under which it now makes no claim, does not estop it from denying the validity of the patent.—Schulte v. Colorado Tire & Leather Co., 524.

IX. CONSTRUCTION AND OPERATION OF LETTERS PATENT.

(B) Limitation of Claims.

⚷165 (U.S.C.C.A.Ill.) A patent is sustained, not for what the inventor may have done in effect, but for what is pointed out clearly and distinctly in his claims. As much as is not so claimed belongs to the public.—Knight Soda Fountain Co. v. Walrus Mfg. Co., 125.

⚷167(1) (U.S.C.C.A.Md.) A patent claim may be limited by reference to the specifications.—Bisight Co. v. Onepiece Bifocal Lens Co., 34[illegible]

⚷168(2) (U.S.C.C.A.Colo.) Where, after rejection of a claim for anticipation, it is amended by adding a limiting feature and then allowed, the added feature becomes an essential element, and a structure from which it is omitted does not infringe.—Schulte v. Colorado Tire & Leather Co., 524.

⚷178 (U.S.C.C.A.Mich.) Where a claim defines an element in terms of its form, material, location, or function, thereby apparently creating an express limitation, and the limitation pertains to the inventive step, rather than to its environment, and imparts a substantial function which the patentee considered of importance, forms excluded, cannot be considered covered by the patent, under the doctrine of equivalency. —D'Arcy Spring Co. v. Marshall Ventilated Mattress Co., 304.

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X. TITLE, CONVEYANCES, AND CONTRACTS.

(A) Rights of Patentees in General.

⚷185 (U.S.C.C.A.Mich.) Though the patentee did not anticipate the use to which the patented article could be and was put, he is entitled to protection for such use, where the adaptability was inherent in the structure shown and described in claims and specifications.—D'Arcy Spring Co. v. Marshall Ventilated Mattress Co., 304.

(C) Licenses and Contracts.

⚷209(1) (U.S.C.C.A.Mich.) Where there was no contention that the patents covered by license from plaintiff to defendant for a process for bleaching wood veneers were invalid, and the contract gave defendant an exclusive license to use the patent, with the right to grant licenses thereunder to others, the fact that the process did not become a commercial success is no ground for finding a total failure of consideration.—Bird's-Eye Veneer Co. v. Franck-Philipson & Co., 334.

⚷211(2) (U.S.C.C.A.Ohio) Licensee to manufacture and sell a patented scale *held* to have effectively canceled its contract with the owner of the patent, under a clause of the contract between them entitling it to do so if the scale failed to be commercially successful to its satisfaction, though its notice was that it considered the device so inoperative or defective as to entitle it to cancellation, a reason which seemed primarily to rest on another clause of the contract.—Computing Scale Co. v. Barnard Co., 318.

Where the contract, whereby the owner of a patent licensed manufacture and sale, gave the licensee right to cancel if the device failed "to be commercially successful to the satisfaction" of the licensee, there was no necessary intent that commercial success could be decided only by actual manufacture and commercial sale, the reasonable meaning being that, if the licensee found itself not satisfied within the time limit specified that the device would be a commercial success, it might cancel.—Id.

⚷212(1) (U.S.C.C.A.Mich.) Conceding that the owner of a patent, which granted an exclusive license to defendant on payment of a royalty, impliedly warranted the commercial utility of the patent, yet where the parties, after defendant had been unable to make the patent commercially successful, entered into a new contract fixing their several rights, the implied warranty was waived, and the fact that the patent process did not prove a success is no defense to an action for accrued royalties.—Bird's-Eye Veneer Co. v. Franck-Philipson & Co., 334.

⚷219(5) (U.S.C.C.A.Ohio) In an action for royalties due under an agreement licensing the manufacture and sale of a patented scale, evidence *held* insufficient to show that defendant licensee was in fact satisfied with the scale as commercially practicable, but only pretended not to be, acting in bad faith and to injure the patent, when it exercised its right to cancel the agreement, under a clause permitting such action if the scale was not commercially successful to its satisfaction.—Computing Scale Co. v. Barnard Co., 318.

XII. INFRINGEMENT.

(A) What Constitutes Infringement.

⚷226 (U.S.C.C.A.Ohio) As between plaintiff's earlier and defendant's later patent, a finding that the earlier device, if later, would not have infringed the later patent, is not helpful in deciding whether defendant's device infringed plaintiff's patent.—Dunn Wire-Cut Lug Brick Co. v. Toronto Fire Clay Co., 326.

(C) Suits in Equity.

⚷287 (U.S.C.C.A.Mich.) The president and general manager of a corporation which infringed patent is not individually liable for damages and profits on infringement, unless he inflicted the damages or received the profits otherwise than through the usual relations between officer and corporation.—D'Arcy Spring Co. v. Marshall Ventilated Mattress Co., 304.

⚷290 (U.S.C.C.A.Mich.) In a suit against a corporation for infringement of patent, the president and general manager, in active control of the corporate affairs, may be made defendant, so that he may be personally bound and enjoined.—D'Arcy Spring Co. v. Marshall Ventilated Mattress Co., 304.

⚷312(2) (U.S.C.C.A.Wis.) In an accounting for infringement of patent, in determining what is a reasonable royalty for infringing sales, evidence of royalty on another patent would have no bearing.—Farmers' Handy Wagon Co. v. Beaver Silo & Box Mfg. Co., 338.

⚷318(1) (U.S.C.C.A.Wis.) To entitle a complainant to recover damages from an infringer, when there is no evidence of an established or a reasonable royalty, it must show that it would probably have made the sales made by defendant but for the infringement, and the profits it would have made thereon.—Farmers' Handy Wagon Co. v. Beaver Silo & Box Mfg. Co., 338.

⚷318(4) (U.S.C.C.A.Ohio) Where the patented improvement in a machine for uniting knit fabrics has directly to do only with the shape of the needle, the patentee, suing for infringement, cannot recover the profits of using the entire machine, other parts of which have been properly, though unnecessarily, put into claim combination with the needle, but must be confined to profits resulting from the use of the improved, as compared with an unimproved, needle.—Southern Textile Machinery Co. v. Fay Stocking Co., 311.

⚷318(6) (U.S.C.C.A.Wis.) Where the net profits made by the manufacture of an infringing article are shown, but such articles also infringed another patent, for which defendant was compelled to pay, a reasonable royalty for the use of the latter patent, the burden of showing which is on defendant, should be deducted, and the remaining profits are recoverable by complainant.—Farmers' Handy Wagon Co. v. Beaver Silo & Box Mfg. Co., 338.

⚷322 (U.S.C.C.A.Ohio) In suit for infringement of patent, before any accounting is ordered for profits, as distinguished from such damages as might be shown by any of the accepted measures, the trial court should be sat-

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isfied there is some theory of recovering profits plausible enough to justify an effort to establish it.—Southern Textile Machinery Co. v. Fay Stocking Co., 311.

⟹324(1) (U.S.C.C.A.Ohio) In suit for infringement of patent, where, after direction of the usual interlocutory decree on finding of infringement, defendants present foreign patents said to anticipate plaintiff's product, and ask leave to apply to reopen the case and put them into the record, on account of the public interest and the interest of the courts, the proposed evidence will be permitted to be brought into the record on defendants' meeting additional expenses of another trial; their showing to excuse failure to put in the evidence in due time not being satisfactory.—Dunn Wire-Cut Lug Brick Co. v. Toronto Fire Clay Co., 326.

⟹324(6) (U.S.C.C.A.Ohio) Bill for infringement of patent should not have been dismissed for the easily remediable defect in the proof as to whether or not defendant company did or did not use certain infringing needles, but decree will not be directed for plaintiff, rather the subject should be followed up, on motion of the court, if necessary, far enough to develop the facts.—Southern Textile Machinery Co. v. Fay Stocking Co., 311.

XIII. DECISIONS ON THE VALIDITY, CONSTRUCTION, AND INFRINGEMENT OF PARTICULAR PATENTS.

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II. APPLICATION.

⟹39(4) (U. S. C. C. A. Mass.) An unsecured creditor of one C. agreed to make a further loan to be secured by a note executed by the bankrupt as well as by the deposit as collateral of mining stock, the offer of C. providing that the security should be applicable to other indebtedness; after the bankrupt had applied the dividends from the mining stock to C.'s previous unsecured indebtedness, and the bankrupt executed a mortgage to secure its note then overdue, *held*, that the application of the dividends was within the power of the creditor, and other creditors of the bankrupt were not entitled to assert that dividends should have been treated as having discharged the bankrupt's note.—Turner v. Woodard, 537.

⟹39(6) (U.S.C.C.A.Mass.) A creditor, holding security generally applicable to all his loans, may apply the proceeds of any of such securities primarily in payment of debts not otherwise secured.—Turner v. Woodard, 537.

PENALTIES.

See Damages, ⟹78; Perjury, ⟹19.

PERJURY.

II. PROSECUTION AND PUNISHMENT.

⟹19(2) (U.S.C.C.A.Cal.) Under Criminal Code § 125 (Comp. St. § 10295), imposing a penalty on any one who states under oath material matter which he does not believe to be true, an indictment charging perjury by making a false affidavit of proof of improvements on a desert land claim is not fatally defective for failure to charge that the affidavit was accepted and acted upon by the government.—Berry v. U. S., 271.

⟹25(1) (U.S.C.C.A.Cal.) The materiality of a perjured statement may be alleged in an indictment, either by an allegation of materiality or by pleading facts which show materiality.—Berry v. U. S., 271.

⟹25(6) (U.S.C.C.A.Cal.) An indictment for perjury, which alleged that defendant made and filed with the register a false affidavit of work done concerning a desert land entry then pending sufficiently alleges the materiality of the false affidavit, under the statute requiring proof of the expenditure of money on improvements.—Berry v. U. S., 271.

⟹26(½) (U. S. C. C. A. Cal.) An indictment charging that defendant made affidavit in support of a desert land claim that a certain sum

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was expended for clearing and breaking 20 acres of land, which he knew to be false, and that no clearing or breaking had been done upon the tract of land described in the affidavit, sufficiently alleges the falsity of the affidavit.—Berry v. U. S., 271.

PHYSICIANS AND SURGEONS.

See Courts, ⚷342; Insurance, ⚷514.

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PLEADING.

See Limitation of Actions, ⚷127.

For pleadings in particular actions or proceedings, see also the various specific topics.

For review of rulings relating to pleadings, see Appeal and Error.

PLEDGES.

See Principal and Agent, ⚷105.

⚷42 (U.S.C.C.A.Ohio) Where defendant, to obtain advances, assigned its accounts receivable to a broker, who as authorized, reassigned them to banks, *held* that, as the assignments contemplated such retransfer, the banks were not bound to give notice to defendant of their rights.—International Banking Corporation v. McGraw Tire & Rubber Co., 357.

⚷44 (U.S.C.C.A.Ohio) A debtor, who has pledged nonnegotiable security, and who is not chargeable with notice that the creditor has parted with the security so pledged, may pay his debt to the creditor and thereby become entitled to the return of the security, and the risk is carried by a transferee thereof, who has not given notice of his rights thereto; but where the creditor has the right to repledge, and the original debtor is chargeable with notice that such retransfer has been made, if he pays without obtaining return of the property, he does so at the risk of being compelled to satisfy the claim of the second transferee.—International Banking Corporation v. McGraw Tire & Rubber Co., 357.

Where defendant, to obtain advances, assigned its accounts receivable to a broker, and the assignments gave the broker the right to repledge the accounts, *held*, that defendant was chargeable under the circumstances with notice that the broker had repledged the security, and it repaid the broker the amount of the advances, without procuring the assignment, at its peril.—Id.

Though defendant's assignment of accounts receivable recited that it was contemplated that the pledgee might reassign the same as collateral security for a loan to defendant, and the pledgee reassigned the accounts, obtaining the loan himself and advancing the amount to defendant, *held* that, where defendant repaid the pledgee amount of the advances without obtaining a return of assignments or protecting banks which made the advances to the pledgee, the assignments should be treated as allowing the course of dealing pursued by the pledgee.—Id.

Where defendant assigned accounts receivable to secure advances, and the assignments authorized repledge, the fact that defendant, as the accounts matured, made payments to its assignee, the pledgee, without receiving return of the assignments, etc., did not warrant defendant in paying the entire indebtedness to the pledgee without taking any steps to learn whether the accounts had been reassigned and protect those to whom the accounts may have been reassigned.—Id.

POST OFFICE.

See Criminal Law, ⚷371; Indictment and Information, ⚷121.

III. OFFENSES AGAINST POSTAL LAWS.

⚷35 (U.S.C.C.A.La.) One using letters to induce shipments of produce, with the purpose of converting the proceeds, was guilty of a "fraudulent use of the mails," under Rev. St. § 5480, as amended, by the adoption of the Criminal Code, March 4, 1909 (section 215 [Comp. St. § 10385]), although the letters used stated, "You can ship them B. L. attached if you want to, or I will send you check as soon as they come in;" it not being necessary to render one guilty of such offense, that the letters used disclose a fraud.—Lewis v. U. S., 289.

⚷35 (U.S.C.C.A.Or.) On trial of a defendant for using the mails to defraud by inducing persons to make application through him to purchase public lands under the Timber and Stone Act, evidence that he represented that certain things were not necessary to obtain a patent which were required by the rules of the land office, of which applicants were not told, was admissible, and the representations cannot be justified on the ground that such rules were invalid.—Byron v. U. S., 347.

⚷48(4) (U. S. C. C. A. Cal.) An indictment, charging that defendant devised a scheme and artifice to defraud, and used the mails in carrying out the scheme, which consisted of representations of supernatural powers, *held* sufficient to charge an offense.—Crane v. U. S., 456.

⚷48(4) (U.S.C.C.A.Or.) That allegations, in an indictment, show that representations made by defendants to persons whom they sought to defraud by means of a scheme carried out by use of the mails were inconsistent with each other, does not render the indictment bad.—Byron v. U. S., 347.

⚷49 (U.S.C.C.A.Cal.) In prosecution for devising a scheme and artifice to defraud and using the mails in connection therewith, which scheme consisted of representations by defendant that he was gifted with supernatural powers, evidence *held* sufficient to sustain a conviction.—Crane v. U. S., 456.

⚷49 (U.S.C.C.A.Or.) On trial of a defendant for using the mails to defraud by inducing persons to make application through him to purchase public lands under the Timber and Stone Act, evidence that he represented that certain things were not necessary to obtain a

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patent which were required by the rules of the land office, of which applicants were not told, was admissible.—Byron v. U. S., 347.

PRACTICE.

For practice in particular actions and proceedings, see the various specific topics.

PRESCRIPTION.

See Adverse Possession; Limitation of Actions.

PRICE.

See Damages, ⟹96.

PRINCIPAL AND AGENT.

See Attorney and Client; Brokers; Master and Servant, ⟹180; Railroads, ⟹5½; Sales, ⟹7.

III. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

(A) Powers of Agent.

⟹101(1) (U.S.C.C.A.Ala.) Undisputed evidence, consisting of correspondence between defendant, a manufacturing company, and its agent, who had general authority to solicit contracts subject to approval by defendant, *held* to authorize him to bind defendant by the contract sued on, and to entitle plaintiff to an instructed verdict for the admitted refusal of defendant to perform such contract.—City Ice Co. v. York Mfg. Co., 441.

⟹105(2) (U.S.C.C.A.Ohio) A broker, who borrowed from banks sums which he advanced to defendant, the loan being secured by defendant's pledge of accounts receivable, which he reassigned to the bank, *held* not to have implied authority to receive payment on behalf of the banks of the entire loan, which amounted to over $200,000, because the banks allowed him to receive payments of relatively small sums as the accounts fell due.—International Banking Corporation v. McGraw Tire & Rubber Co., 357.

⟹123(1) (U.S.C.C.A.W.Va.) Authority of an agent to borrow money for his principal, or to obligate his principal to pay the debt of another, is not to be inferred, without clear evidence that it has been granted.—Owens Bottle-Mach. Co. v. Kanawha Banking & Trust Co., 638.

⟹123(12) (U.S.C.C.A.W.Va.) Evidence *held* insufficient to establish authority of an agent to bind his principal by guaranteeing payment of the note of another.—Owens Bottle-Mach. Co. v. Kanawha Banking & Trust Co., 638.

⟹137(1) (U.S.C.C.A.W.Va.) That money borrowed by a building contractor was used in carrying out his contract, and thus went into the owner's property, does not estop him to repudiate an unauthorized promise of his agent to see that the loan was paid, of which he had no knowledge.—Owens Bottle-Mach. Co. v. Kanawha Banking & Trust Co., 638.

(C) Unauthorized and Wrongful Acts.

⟹162 (U.S.C.C.A.Okl.) One who seduces an agent to betray his principal can hold none of the fruits of his bargain.—Barnett v. Kunkel, 370.

(D) Ratification.

⟹170(3) (U.S.C.C.A.W.Va.) A principal cannot be bound by the unauthorized act of an agent on the ground of ratification, because, when first informed of what the agent has done, and called upon to be answerable therefor, he meets the demand with a general repudiation, which does not include an express denial of the agent's authority.—Owens Bottle-Mach. Co. v. Kanawha Banking & Trust Co., 638.

(F) Actions.

⟹190(1) (U.S.C.C.A.W.Va.) In an action against a principal in respect of an act of an alleged agent, the burden is on plaintiff to establish, not only the fact of agency, but that the act upon which he relies was within the agent's authority.—Owens Bottle-Mach. Co. v. Kanawha Banking & Trust Co., 638.

PRIORITIES.

See Bankruptcy, ⟹188.

PROFITS.

See Patents, ⟹318.

PROSTITUTION.

See Indictment and Information, ⟹110.

⟹4 (U.S.C.C.A.Colo.) Evidence *held* to sustain a conviction for violation of the White Slave Traffic Act (Comp. St. §§ 8812–8819), by causing a girl to be transported in interstate commerce for immoral purposes.—Huffman v. U. S., 35.

PUBLIC LANDS.

See Perjury, ⟹19, 25, 26; Post Office, ⟹35, 49; Woods and Forests, ⟹8.

II. SURVEY AND DISPOSAL OF LANDS OF UNITED STATES.

(K) Remedies in Cases of Fraud, Mistake, or Trust.

⟹120 (U.S.C.C.A.Or.) On cancellation of patents to public lands for fraud, the legal title becomes reinvested in the United States, where the equitable title remained, as of the date of the patents, and the land at once becomes subject to a prior act including it within the limits of a forest reserve.—Byron v. U. S., 347.

III. DISPOSAL OF LANDS OF THE STATES.

⟹186 (U.S.C.C.A.W.Va.) A patent to land executed by the Governor of West Virginia *held* void under the Constitution and statutes of the state, and not sufficient to support an action of ejectment, on the ground that a valid conveyance of the state's title had previously been made to another.—Thomas v. Lukens, 505.

PUBLIC SERVICE CORPORATIONS.

See Carriers; Electricity; Railroads; Street Railroads.

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QUIETING TITLE.

See Boundaries, ⚷37; Judgment, ⚷521, 675.

I. RIGHT OF ACTION AND DEFENSES.

⚷10(2) (U.S.C.C.A.Ky.) Under the Kentucky statutes, plaintiff in bill to quiet title to succeed must prove ownership in himself; any weakness of defendant's title not being enough. —Rowe v. Kidd, 195.

⚷12(1) (U.S.C.C.A.Ky.) Under the federal equity practice, as well as under Act Ky. July 3, 1893 (Ky. St. § 11), bill to remove cloud or to quiet title cannot be maintained without proof of possession.—Rowe v. Kidd, 195.

⚷12(7) (U.S.C.C.A.Ky.) Under the Kentucky rule, to constitute actual possession of land one need not have a crop on it or a person living in a house, but, if he has an inclosure on it, such possession may be shown by any acts indicating his intention to hold exclusive possession of it. —Rowe v. Kidd, 195.

Plaintiffs at time of filing bill to remove cloud on title must, for the purpose of maintaining suit, be deemed to have been in actual possession of all the land within their inclosure, which was intact, though their tenant had left a few months before, after gathering his crop, and they had put no new tenant in possession; they not having affirmatively indicated intention to abandon possession, the time elapsing since the former tenant had left not warranting a presumption of abandonment, and they in their bill asserting possession.—Id.

In the absence of conflicting possession, actual possession by plaintiff in suit to remove cloud of part of the land in controversy under their deed, with claim of title to the extent of its boundaries, operates as constructive possession of the remainder; the two being sufficient for maintenance of the bill.—Id.

RACE.

See Criminal Law, ⚷723.

RAILROADS.

See Appeal and Error, ⚷1050; Commerce, ⚷27; Master and Servant, ⚷137, 217, 265, 278, 285, 288, 289; Railroads, ⚷5½; Street Railroads; Trial, ⚷251; Trusts, ⚷84.

I. CONTROL AND REGULATION IN GENERAL.

⚷5½ [New, vol. 6A Key-No. Series].

(U.S.C.C.A.Alaska) The United States, by the purchase of the real and personal property, stock, and bonds of the Alaska Northern Railway Company, under authority of Act March 12, 1914 (Comp. St. §§ 3593a–3593d), became the owner, not only of the property, but of the corporation as its agent for governmental and public purposes, and without its consent the corporation cannot be sued in tort.—Ballaine v. Alaska Northern Ry. Co., 251.

VII. SALES, LEASES, TRAFFIC CONTRACTS, AND CONSOLIDATION.

⚷144(1) (U.S.C.C.A.Ohio) Where a railroad company, which owned all the stock of and operated a second company received a sum of money on condemnation of terminal of second company and purchased new terminal facilities, with the understanding that it should take title in its own name, because all of the property of the second company, including after-acquired property, was subject to mortgage, *held*, in view of the understanding between the companies, that the identity as a trust fund of funds derived from condemnation of the second company's terminal facilities was not lost, where the dominant company at all times had in its treasury a fund large enough to cover that one.—Toledo & C. R. Co. v. Cincinnati, I. & W. R. Co., 613.

Where two railroad companies, which were dominated by a third, which owned all of their common stock, were consolidated, and the third company received shares of the new company to take the place of those of the two constituent companies, and on the books marked off indebtedness due it from such companies, *held*, in view of the fact that the two constituent companies never earned operating expenses, that the act of the third company was a mere cancellation, and not a payment, of debts which they owed it, so that, on foreclosure of a mortgage on the property of one of the constituent companies and reorganization, the third or dominant company could not be required to pay off mortgage on terminal property bought for such company, title to which was held in trust by the third company, on the theory the cancellation of indebtedness, including amount of mortgage indebtedness, which constituent company, as between the companies, was primarily bound to pay, was a payment.—Id.

Where a dominant railroad company, which controlled another company, purchased terminal facilities for it, to take the place of facilities which had been condemned, and took title in its own name, so that a mortgage on the property could be given, the property of the subsidiary company being subject to a mortgage including after-acquired property, *held*, that the subsidiary company was primarily liable for payment of the debt, and, on foreclosure of mortgages on the property of both companies, the receivers of the dominant company were entitled to reimbursement for payments it had made on the terminal property in excess of the funds derived from condemnation of property of the subsidiary company.—Id.

X. OPERATION.

(F) Accidents at Crossings.

⚷307(6) (U.S.C.C.A.Md.) On the question of negligence of a watchman at a railroad crossing over four tracks in inviting three automobiles, following each other, to cross, one of which was struck by a train, the court *held* to have properly instructed that it was his duty to allow all time to cross at ordinary speed "with a fairly clear margin of safety."—Philadelphia, B. & W. R. Co. v. State of Maryland, 231.

⚷350(13) (U.S.C.C.A.Ohio) In an action for injury to a passenger on an auto truck, struck by a train at a railroad crossing, evidence *held* not to justify direction of a verdict for defendant on the ground of contributory negligence.—Fish v. Pennsylvania Co., 269.

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⚷350(28) (U.S.C.C.A.Mich.) Where drivers approached double-track interurban railway, and, though warning bell at crossing for south-bound cars was ringing, and a south-bound car was in sight, bell for north-bound cars was not ringing, so that drivers, thinking that the gestures of the motorman of the south-bound car, intended to warn them of a north-bound car, were meant as commands to cross quickly, did so, and were struck by the north-bound car, whether they were guilty of contributory negligence in having failed to look carefully for it was a jury question.—Detroit United Ry. v. Weintrobe, 132.

(G) Injuries to Persons on or near Tracks.

⚷359(1) (U.S.C.C.A.Ohio) A railroad company is not liable for injury to a trespasser on its tracks, unless its employés knew, or were chargeable with notice, that he was in danger, and nevertheless proceeded wantonly or with reckless indifference.—Cronopolous v. Pennsylvania Co., 278.

⚷391(1) (U.S.C.C.A.Ohio) A flying switch of cars, while dangerous, when made in the yards or private right of way of the railroad company, does not indicate wantonness or reckless indifference of employés making it towards a trespasser, of whose presence they are not shown to have had knowledge.—Cronopolous v. Pennsylvania Co., 278.

RATE.

See Carriers, ⚷18.

REAL ACTIONS.

See Ejectment; Quieting Title.

RECEIVERS.

See Bankruptcy, ⚷20, 188, 288, 296; Courts, ⚷378; Railroads, ⚷144.

RECEIVING STOLEN GOODS.

See Criminal Law, ⚷370.

⚷1 (U.S.C.C.A.N.J.) In a prosecution for receiving stolen goods, under Act Feb. 13, 1913 (Comp. St. §§ 8603, 8604), the purchase of property not actually stolen is not criminal, even if the accused buyer believed it to have been stolen.—Le Fanti v. U. S., 436.

⚷3 (U.S.C.C.A.N.J.) When goods actually stolen came into accused's possession, the possibility that he considered them embezzled, instead of stolen, does not invalidate a conviction for receiving stolen goods, in violation of Act Feb. 13, 1913 (Comp. St. §§ 8603, 8604).—Le Fanti v. U. S., 436.

⚷4 (U.S.C.C.A.N.J.) The doctrine that one intending to receive stolen goods, but withdrawing before committing the crime, cannot be convicted, is inapplicable, where accused had constructive possession of the property.—Le Fanti v. U. S., 436.

⚷8(3) (U.S.C.C.A.N.J.) Evidence that accused told boys who had stolen a bale of silk that his place was being watched, that he showed them where to hide the silk, etc., *held* to sustain jury finding that the silk passed to accused's constructive possession.—Le Fa U. S., 436.

Evidence that accused, when offered a bale of silk by express employés, told th drive to a dump and throw it off, whic did, leaving it among bushes and weeds *held* to sustain a conviction for receivin en goods under Act Feb. 13, 1913 (Com §§ 8603, 8604).—Id.

RECORDS.

See Adverse Possession, ⚷100; Bankr ⚷184; Courts, ⚷356; Criminal Law 1090; Patents, ⚷324; Sales, ⚷474

REED AMENDMENT.

See Conspiracy, ⚷28; Criminal Law, ⚷ Intoxicating Liquors, ⚷132, 138, 236.

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See Appeal and Error, ⚷107; Bankru ⚷227.

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See Courts, ⚷405.

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See Bankruptcy, ⚷255.

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I. REQUISITES AND VALIDITY O CONTRACT.

⚷6 (U.S.C.C.A.Ill.) A contract under whi a mercantile company assigned accounts again its customers, which it guaranteed to the oth party, which advanced a stated per cent. their face value, collected the same, and, aft deducting the advance, expenses, and an agre charge, returned the balance to the compan under the law of Illinois and of the feder courts, is a loan contract, and not one for th sale and purchase of the accounts.—Nations Trust & Credit Co. v. F. H. Orcutt & Son Co. 630.

⚷7 (U.S.C.C.A.Mass.) A contract by whic title to patterns passed to defendant, *held*

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'ales, and not an agency, contract.—Standard 'ashion Co. v. Magrane Houston Co., 593.

II. CONSTRUCTION OF CONTRACT.

⚷58 (U.S.C.C.A.Mass.) Where a sales con-'ract ran for a two-year term, and from term 'o term thereafter, until terminated by three 'months' notice in writing given 30 days after 'xpiration of any contract period, etc., a neg-ıtive covenant not to sell certain goods during 'he term of the contract applies to the entire 'ife of the contract, and not merely to the first 'wo-year term.—Standard Fashion Co. v. Ma-'rane Houston Co., 593.

⚷84 (U.S.C.C.A.Mass.) Where a sales con-'ract ran for a term of two years, and from 'erm to term thereafter, until terminated by 'hree months' notice in writing given within 30 'lays after expiration of any contract period, 'he duration of the contract is automatically 'xtended for another two-year term upon fail-ıre to give the required notice.—Standard Fashion Co. v. Magrane Houston Co., 593.

IX. CONDITIONAL SALES.

⚷474(2) (U.S.C.C.A.Mich.) Although a chattel mortgage in Michigan is invalid as against certain creditors, unless recorded, a conditional contract of sale, which reserves title to the vendor, is valid at the suit of the vendor, even as against similar creditors.—Smith v. Carukin, 51.

SCARS.

See Damages, ⚷216.

SEARCHES AND SEIZURES.

See Criminal Law, ⚷1023.

⚷5 (U.S.C.C.A.Tenn.) Denial of a motion by defendant for the return of papers taken from his pocket after arrest *held* error.—Laughter v. U. S., 162.

SECRETARY OF WAR.

See Eminent Domain, ⚷168.

SEDITION.

See Criminal Law, ⚷371, 812; War, ⚷4.

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See Criminal Law, ⚷984.

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See Criminal Law, ⚷149, 423; Monopolies, ⚷12, 29, 31.

SHIPPING.

See Admiralty, ⚷118; Collision, ⚷11, 71, 99; Criminal Law, ⚷418; Damages, ⚷46, 62, 131, 132, 133; Husband and Wife, ⚷209; Intoxicating Liquors, ⚷138, 229; Master and Servant, ⚷128.

III. CHARTERS.

⚷39 (U.S.C.C.A.N.Y.) A charter does not terminate at the expiration of the lay days for loading because loading has not then begun; but where the agreement is to load at a certain rate and thereafter pay demurrage, the ship must wait thereafter for a reasonable time, the demurrage being the agreed compensation.—Steger v. Orth, 73.

⚷52 (U.S.C.C.A.N.Y.) Where a charterer refuses to load the cargo contracted for, the owner is under no obligation to accept a different cargo from him on different terms.—Steger v. Orth, 73.

V. LIABILITIES OF VESSELS AND OWNERS IN GENERAL.

⚷81(1) (U.S.C.C.A.N.C.) A vessel is liable for the negligence of a mere pilot, even when employed under the compulsion of law.—Wilmington Ry. Bridge Co. v. Franco-Ottoman Shipping Co., 234.

⚷81(2) (U.S.C.C.A.N.C.) Where a bridge over a navigable river was a lawful structure, though it obstructed navigation, a vessel must approach it with reasonable skill and care to avoid injuring it, having in view the difficulty and peril occasioned by the bridge itself, but need not guarantee its safety.—Wilmington Ry. Bridge Co. v. Franco-Ottoman Shipping Co., 234.

In an emergency created by a sudden sheer of a vessel when approaching a drawbridge, navigator was responsible for reasonable care, not the highest degree of skill and care.—Id.

⚷84(3) (U.S.C.C.A.Md.) A ship, under duty to furnish proper appliances for loading by a stevedore, who did so by furnishing a steam winch and spools, *held* not chargeable with negligence because it did not give instructions which to use in a particular case, but left the choice to the stevedore, which employed experienced men, and which by making an improper choice caused the death of an employé.—Atlantic Transport Co. v. State of Maryland, 23.

⚷86(2) (U.S.C.C.A.N.C.) Where a moving vessel collided with a drawbridge, there is a presumption of negligence on the part of the vessel; but that presumption may be rebutted by proof that the course taken by the navigator in the emergency caused by the location of the bridge was prudent and skillful.—Wilmington Ry. Bridge Co. v. Franco-Ottoman Shipping Co., 234.

Where a collision occurred between a vessel in tow of a tug and a drawbridge, which though lawful, was constructed diagonally across the channel, so as to allow very little room for passing vessels, evidence *held* not to show that the vessel approached the bridge on a flood tide, or that it was negligent navigation of the vessel to attempt to turn to port, instead of immediately anchoring, after she began to sheer to star-

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board when passing close to shoals near the bridge, as she was compelled to do to pass through the draw.—Id.

VIII. CARRIAGE OF PASSENGERS.

⟹166(4) (U.S.C.C.A.Mich.) On libel by a number of passengers on respondents' vessel, evidence *held* sufficient to sustain a finding that they were supplied with water infected with typhoid fever germs.—Chicago, D. & G. B. Transit Co. v. Moore, 466.

On libels by passengers on a steamship, evidence *held* to warrant a finding that they contracted typhoid fever from drinking polluted water which was furnished by the vessel.—Id.

Evidence *held* to warrant a finding that one passenger on respondents' vessel contracted arthritis, resulting from an intestinal infection from drinking impure water furnished on the vessel.—Id.

Evidence *held* to warrant a finding that one passenger on respondents' vessel contracted typhoid fever resulting from impure drinking water furnished by the vessel, and that gallstones resulted therefrom.—Id.

Evidence *held* insufficient to warrant a finding that a passenger on a vessel, who became ill, suffered from typhoid or paratyphoid fever contracted from drinking impure water furnished by the vessel.—Id.

A finding that a passenger on a vessel, as a result of drinking impure water furnished, contracted typhoid fever, which caused a rectal abscess, *held* warranted.—Id.

IX. DEMURRAGE.

⟹183 (U.S.C.C.A.N.Y.) Interest is allowable on demurrage based on charter party agreement, whatever the form of action.—Steger v. Orth, 73.

X. GENERAL AVERAGE.

⟹196 (U.S.C.C.A.P.R.) Harter Act, § 3, relating to liability of vessel owners, does not exonerate a vessel owner from liability for general average contribution in respect to cargo jettisoned.—The Ernestina, 572.

⟹200 (U.S.C.C.A.P.R.) A general average decree cannot be entered against vessel owners for items due cargo owners not parties to the record.—The Ernestina, 572.

A general average decree, including items in favor of cargo owners not parties to the record, is not cured by the alleged failure of defendant shipowner to obtain security from such cargo owners or to have a general average stated.—Id.

SPECIFIC PERFORMANCE.

See Estoppel, ⟹62.

I. NATURE AND GROUNDS OF REMEDY IN GENERAL.

⟹12 (U.S.C.C.A.Colo.) A party to a contract who aided and abetted actions by others which were the sole cause of a breach of contract by the other party cannot urge such breach as a defense to a suit for specific performance.—Gas Securities Co. v. Antero & Lost Park Reservoir Co., 399.

⟹17 (U.S.C.C.A.Colo.) Bondholders of an irrigation district *held* entitled to enforce specific performance of a contract between the district and a third party, who was willing to perform, where its abandonment by the district would defeat the purpose for which it was organized, and leave the bondholders without security.—Gas Securities Co. v. Antero & Lost Park Reservoir Co., 399.

II. CONTRACTS ENFORCEABLE.

⟹74 (U.S.C.C.A.Colo.) Under some circumstances a court may decree specific performance of a construction contract.—Gas Securities Co. v. Antero & Lost Park Reservoir Co., 399.

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I. POLITICAL STATUS AND RELATIONS.

⟹12(2) (U.S.C.C.A.Tenn.) Relative to transporting whisky into Tennessee from Missouri in violation of Act March 3, 1917, § 5 (Comp. St. 1918, § 8739a), in the absence of evidence of avulsion, the middle of the navigable channel of the Mississippi as it then existed is to be taken as the state line.—Bishop v. U. S., 265.

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VI. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

⟹225 (U.S.C.C.A.Mass.) The fact that the Clayton Act Oct. 15, 1914, was enacted after similar restrictions had been held not obnoxious at common law or under federal and state anti trust laws, creates an inference that Congress intended to change the law.—Standard Fashion Co. v. Magrane Houston Co., 593.

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STEVEDORES.

See Master and Servant, ⚷128; Shipping, ⚷84.

STIPULATIONS.

See Criminal Law, ⚷1090.

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See Internal Revenue, ⚷19.

STREET RAILROADS.

See Carriers; Courts, ⚷378.

II. REGULATION AND OPERATION.

⚷66 (U.S.C.C.A.Ohio) On expiration of the franchise rights of a street railroad company to use the streets of a city if the company at the city's request continues to occupy the streets and to give service, the regulatory power of the city can be exercised only subject to the condition that it must not bring about confiscation.—City of Toledo v. Toledo Rys. & Light Co., 426.

STRIKES.

See Criminal Law, ⚷423.

TAXATION.

See Criminal Law, ⚷330; Internal Revenue.

TENANCY IN COMMON.

See Corporations, ⚷619; Wills, ⚷748.

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See Admiralty, ⚷118; Adverse Possession, ⚷21; Aliens, ⚷53; Appeal and Error, ⚷837; Bankruptcy, ⚷101, 152, 164; Criminal Law, ⚷370; Death, ⚷1; Equity, ⚷359; Estoppel, ⚷95; Gifts, ⚷49; Guardian and Ward, ⚷105; Habeas Corpus, ⚷25; Indians, ⚷15; Interest, ⚷39; Mines and Minerals, ⚷79, 81; Patents, ⚷324; Public Lands, ⚷120; Shipping, ⚷39; Woods and Forests, ⚷8.

TORTS.

See Collision; Limitation of Actions, ⚷127; Negligence, ⚷101–134; Railroads, ⚷5½.

TOWAGE.

See Collision, ⚷11, 71, 74, 99.

⚷19 (U.S.C.C.A.N.C.) Where a vessel had contracted with a towing company to be towed to dock, and at the time of a collision with a drawbridge was navigated by the master of the tugboat, whose orders were transferred to the crew by the vessel's master, negligence in navigation of the vessel was negligence of an independent contractor, for which the vessel is not liable.—Wilmington Ry. Bridge Co. v. Franco-Ottoman Shipping Co., 234.

TRADE-MARKS AND TRADE-NAMES.

IV. INFRINGEMENT AND UNFAIR COMPETITION.

(C) Actions.

⚷93(3) (U.S.C.C.A.Colo.) Evidence *held* insufficient to establish such similarity between the advertising literature of defendant and complainant as to amount to unfair competition.—Schulte v. Colorado Tire & Leather Co., 524.

TRADE UNIONS.

See Criminal Law, ⚷423; Monopolies, ⚷12.

TREASON.

See Criminal Law, ⚷371, 812; War, ⚷4.

TRESPASS.

See Railroads, ⚷359, 391.

TRIAL.

See Continuance; Criminal Law, ⚷656, 787, 812.

For trial of particular actions or proceedings, see also the various specific topics.

For review of rulings at trial, see Appeal and Error.

VI. TAKING CASE OR QUESTION FROM JURY.

(A) Questions of Law or of Fact in General.

⚷142 (U.S.C.C.A.Va.) Defendant's motion for a directed verdict at close of plaintiff's case was

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properly refused where reasonable men might reasonably differ as to inferences to be drawn from the evidence.—American Locomotive Co. v. Thornton, 381.

⚷148 (U.S.C.C.A.N.Y.) Where plaintiff's counsel, on both parties moving for a directed verdict, contended there were no jury questions, denial of his motion to submit issues of fact, "if any there be," to the jury, does not constitute reversible error.—Sampliner v. Motion Picture Patents Co., 220.

(D) Direction of Verdict.

⚷177 (U.S.C.C.A.N.Y.) If both parties request a directed verdict, issues of fact need be submitted to the jury only where there are controverted questions of fact upon which the court has not made findings pursuant to submission by the parties.—Sampliner v. Motion Picture Patents Co., 220.

VII. INSTRUCTIONS TO JURY.

(A) Province of Court and Jury in General.

⚷191(10) (U.S.C.C.A.Va.) In a servant's personal injury action, a requested instruction assuming that a fellow servant's negligence was sole cause of injury is properly refused, where evidence indicated that defendant employer's failure to inspect and repair a machine contributed to injury.—American Locomotive Co. v. Thornton, 381.

⚷194(19) (U.S.C.C.A.N.J.) It is proper to refuse a requested instruction in servant's personal injury action when the granting of the request would have required the jury to disregard plaintiff's testimony, and to accept defendant's testimony as to how and when the accident happened.—Philadelphia & R. Ry. Co. v. McKibbin, 452.

(D) Applicability to Pleadings and Evidence.

⚷248 (U.S.C.C.A.Mich.) Where an employé of a contractor, in the course of constructing buildings near a high tension electric wire, met his death when he touched the wires with his hands, *held* that, in an action against the company, a charge that the electric company was not bound to provide for absolute safety of our coming in contact with the wires, but was only bound to use reasonable care, depending on the circumstances, was not erroneous, though it gave the jury only an abstract rule.—Curcuru v. Peninsular Electric Light Co., 79.

⚷251(8) (U.S.C.C.A.Mich.) In an action against an interurban railroad for deaths at its crossing, instruction *held* not erroneous as submitting the theory of last clear chance not pleaded.—Detroit United Ry. v. Weintrobe, 132.

⚷252(11) (U.S.C.C.A.Va.) In a servant's personal injury action, a requested instruction based upon theory that it was plaintiff's duty to supervise the inspection of machine which caused his injury was properly refused where evidence showed fact to be otherwise.—American Locomotive Co. v. Thornton, 381.

⚷253(5) (U.S.C.C.A.Alaska) The complaint alleging work for a time under employment at a certain wage, a certain payment, and a certain balance due, and answer denying such wage was stipulated, and alleging agreement was for a certain lower wage, and that plaintiff has been paid in full, an instruction that it is either $60 a month—the contract alleged by plaintiff and denied by defendant—or nothing is erroneous, as taking from the jury the question whether plaintiff had been paid the wages at the rate alleged by defendant to have been stipulated, exceeding the amount alleged in the complaint to have been paid.—Brown v. Pullen, 658.

(E) Requests or Prayers.

⚷260(1) (U.S.C.C.A.Mich.) Requests to charge, covered by the general charge so far as they were proper, were properly refused.—Detroit United Ry. v. Weintrobe, 132.

XI. WAIVER AND CORRECTION OF IRREGULARITIES AND ERRORS.

⚷420 (U.S.C.C.A.Va.) Refusing a motion for a directed verdict at close of plaintiff's case is not erroneous where defendant subsequently offers evidence in its own behalf.—American Locomotive Co. v. Thornton, 381.

TRUST DEEDS.

See Mortgages.

TRUSTS.

See Corporations, ⚷619; Monopolies, ⚷12–31; Railroads, ⚷144; Waters and Water Courses, ⚷230.

I. CREATION, EXISTENCE, AND VALIDITY.

(B) Resulting Trusts.

⚷84 (U.S.C.C.A.Ohio) Where a railroad company, which owned all the stock of and operated a second company, after receiving damages for condemnation of terminal property of the second company purchased new terminal facilities, taking title in its own name, as the property of the second company was subject to a mortgage including after-acquired property, and, neither company having sufficient funds to pay outright for the new terminal, property had to be mortgaged, *held* that, under the circumstances, a resulting trust in favor of the second company arose, under Burns' Ann. St. Ind. 1914, §§ 4017, 4019.—Toledo & C. R. Co. v. Cincinnati, I. & W. R. Co., 613.

(C) Constructive Trusts.

⚷110 (U.S.C.C.A.R.I.) In a suit by the trustee of a bankrupt mining company against stockholders and officers of the company on the theory that directors and stockholders who had acquired title to mining claims which the company was developing under an option contract to purchase and who were working in connection with the manager of the company who expected to acquire its valuable personal property by enforcing his claim for salary, evidence *held* to establish a conspiracy to wreck the company and to furnish basis for the enforcement of a constructive trust; the parties to the conspiracy acting in violation of the relation of trust.—Munro v. Smith, 1.

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TYPHOID.

See Admiralty, ⟹118; Damages, ⟹46, 130, 131, 132, 133; Husband and Wife, ⟹209; Shipping, ⟹166.

UNFAIR COMPETITION.

See Trade-Marks and Trade-Names, ⟹93.

UNITED STATES.

See Army and Navy; Criminal Law, ⟹1169; Embezzlement, ⟹47; Eminent Domain, ⟹243; Indictment and Information, ⟹28; Railroads, ⟹5½; Woods and Forests, ⟹8.

V. ACTIONS.

⟹125 (U.S.C.C.A.N.Y.) The United States may not be sued except with its consent.—Jacob Hoffman Brewing Co. v. McElligott, 487.

A suit to enjoin a United States attorney from instituting criminal proceedings under a federal statute is a suit against the United States, which cannot be maintained unless property rights are threatened with irreparable damage, and the statute is either unconstitutional or the attorney is transcending his authority under a valid statute.—Id.

UNITED STATES RAILROAD ADMINISTRATION.

See Railroads, ⟹5½.

USURY.

I. USURIOUS CONTRACTS AND TRANSACTIONS.

(B) Rights and Remedies of Parties.

⟹102(1) (U.S.C.C.A.Ill.) Under the law of Illinois, as by the general law, transactions tainted with usury, but which have been definitely settled and closed as between the parties, cannot thereafter be made the subject of recovery or accounting respecting the usurious interest paid.—National Trust & Credit Co. v. F. H. Orcutt & Son Co., 630.

VENDOR AND PURCHASER.

See Corporations, ⟹183; Railroads, ⟹5½; Sales.

VENUE.

See Criminal Law, ⟹935.

VERDICT.

See Criminal Law, ⟹878.

WAR.

See Aliens, ⟹18; Criminal Law, ⟹371, 812; Injunction, ⟹75, 105; Internal Revenue, ⟹19; Intoxicating Liquors, ⟹134; Railroads, ⟹5½.

⟹4 (U.S.C.C.A.Cal.) Under Espionage Act, § 3, as amended by Act May 16, 1918, § 1 (Comp. St. 1918, § 10212c), declaring a punishment for, by word or act, supporting or favoring the cause of any country with which the United States is at war, or opposing the cause of the United States therein, intent is a part of the offense; mental attitude being implied in the words "support," "favor," and "oppose."—Schulze v. U. S., 257.

The offense under Espionage Act, § 3, as amended by Act May 16, 1918, § 1 (Comp. St. 1918, § 10212c), of by word or act supporting or favoring the cause of a country with which the United States is at war, or opposing the cause of the United States therein, being one whose definition necessarily includes intent, indictment therefor need not allege intent, but only the acts done.—Id.

⟹4 (U.S.C.C.A.Ill.) On trial of a defendant charged with violation of Espionage Act, title 1, § 3 (Comp. St. 1918, § 10212c), by willfully making false statements with intent to interfere with the operation and success of the military forces of the United States, admission of evidence of expressions of defendant before the United States was at war, though showing a siding with Germany as against the Allies, held error.—Kammann v. U. S., 260.

⟹32 (U.S.C.C.A.S.C.) In Articles of War, Rev. St. § 1342, art. 2(d), as amended by Act Aug. 29, 1916, § 3 (Comp. St. § 2308a), providing that "in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field" shall be subject to military law, the phrase "in the field" is used in its technical military sense, and includes forces in cantonments or training camps within or without the United States.—Hines v. Mikell, 28.

WAR TAX.

See Internal Revenue, ⟹19.

WAR TIME PROHIBITION.

See Injunction, ⟹105; Intoxicating Liquors, ⟹134.

WATERS AND WATER COURSES.

See Admiralty, ⟹118; Damages, ⟹46, 131, 133; Estoppel, ⟹62; Husband and Wife, ⟹209; Navigable Waters; Shipping, ⟹166; Specific Performance, ⟹17.

IX. PUBLIC WATER SUPPLY.

(B) Irrigation and Other Agricultural Purposes.

⟹230(4) (U.S.C.C.A.Colo.) Where the owners of arid lands have organized an irrigation district under a statute, and the district has issued and sold to the public its negotiable bonds, which are a lien on the lands therein, there is a definite obligation on its part to devote the proceeds to the irrigation of the lands, creating a trust relation between the district and its bondholders, which trust the latter may enforce in equity.—Gas Securities Co. v. Antero & Lost Park Reservoir Co., 399.

Under Colorado Irrigation Act, § 3452, providing that the title to all property acquired under its provisions shall vest in the irrigation district, and shall be held by it in trust "for the uses and purposes set forth in this act," a district cannot, after using some of the funds acquired from the sale of bonds in the prose-

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cution of a plan of irrigation, as against its bondholders abandon all plans of irrigation. —Id.

WHITE SLAVE ACT.

See Indictment and Information, ⚷110; Prostitution, ⚷4.

WILLS.

See Descent and Distribution; Gifts, ⚷49.

VII. RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES.

(A) Nature of Title and Rights in General.

⚷748 (U.S.C.C.A.Mont.) A suit by a legatee or devisee of stock in a Montana corporation, which owned real estate, but which had been dissolved by expiration of its term of incorporation, to recover her interest from a third person who claims ownership, is not one to recover the stock for the benefit of the estate, but one brought as tenant in common of the property under Rev. Codes Mont. § 4796, and may be maintained without joining the other devisees or the executors.—Barker v. Edwards, 460.

WITNESSES.

See Criminal Law, ⚷742, 757; Evidence.

II. COMPETENCY.

(A) Capacity and Qualifications in General.

⚷52(7) (U.S.C.C.A.Okl.) In a criminal prosecution in a federal court against a wife, her husband is not a competent witness in her behalf against the objection of the prosecution.—Adams v. U. S., 282.

WOODS AND FORESTS.

See Public Lands, ⚷120.

⚷8 (U.S.C.C.A.Or.) On cancellation of patents to public lands for fraud, the legal title becomes reinvested in the United States, where the equitable title remained, as of the date of the patents, and the land at once becomes subject to a prior act including it within the limits of a forest reserve.—Byron v. U. S., 347.

The authority given the President by Act June 25, 1910, § 1 (Comp. St. § 4523), to temporarily withdraw public lands from settlement or sale, includes such withdrawals for the purpose of including the land in a national forest.—Id.

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WRITS.

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